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Lee Kuang Guat (suing as the father of the deceased, Lee Chu Ling) v Chiang Woei Chien (practicing as Chiang Chambers, Advocates and Solicitors)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCvC)(W)-1985–10 OF 2019
ABDUL KARIM, NANTHA BALAN AND SUPANG LIAN JJCA
C 30 NOVEMBER 2020

Tort — Negligence — Professional negligence — Plaintiff sued defendant for professional negligence and breach of contract — Whether there was solicitor-client relationship between plaintiff and defendant — Whether defendant could disavow that there was any solicitor-client relationship with plaintiff — Standard of care — Breach of — Whether defendant owed any duty of care to plaintiff

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This was an appeal by the appellant ('the plaintiff') against the decision of the learned judicial commissioner ('the JC') of the High Court in dismissing the plaintiff's claim per Shah Alam High Court suit ('Suit 20'). Suit 20 was essentially a claim for professional negligence and breach of contract against the respondent ('the defendant') who was an advocate and solicitor. The plaintiff's daughter died on 15 September 2008 as a result of horrific head injuries sustained in a motor-vehicle accident, which occurred on 14 September 2008. The defendant was asked through a tout via a letter to file a dependency action on behalf of the plaintiff. The defendant had not met the plaintiff and did not collect any deposit towards fees and disbursements. The plaintiff had not executed a warrant to act in favour of the defendant. Nevertheless, on 12 September 2011, the defendant filed a claim on behalf of the plaintiff for dependency ('the dependency suit'). However, on 6 October 2011 the dependency suit was struck out due to counsel's non-attendance at the first case management before the Registrar. The plaintiff sued the defendant for professional negligence and breach of contract via Suit 20. After a full trial, the JC dismissed Suit 20 on the basis, inter alia, that there was no solicitor-client relationship between the plaintiff and the defendant. Hence, this appeal.

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Held, allowing the appeal:

(1) The defendant assumed responsibility as an advocate and solicitor when he filed the dependency suit for and on behalf of the plaintiff. The defendant agreed to and did file the dependency suit amounted to an 'implied retainer' and gave rise to a solicitor-client relationship between the defendant (solicitor) and the plaintiff (client). The absence of a warrant to act did not preclude an implied retainer. And, once there was

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a retainer, the defendant was under a duty to protect the plaintiff's interest. This was regardless of whether the plaintiff had paid any fee to the defendant or whether the plaintiff was contactable or whether the solicitor had even met the plaintiff. Hence, the defendant could not therefore disavow or deny that the plaintiff was his client at all material times (see paras 88–91).

(2) This was a simple case of a litigation solicitor's failure to protect the interest of his client by failing to attend case management which resulted in the dependency suit being struck out. The defendant had not discharged his duty towards his client the plaintiff in terms of protecting the plaintiff's interest. All that the defendant had to do was turn up at the case management and obtain a long case management date so that matters could be attended to in the meanwhile. There was no paper trail to show that the defendant did what was necessary to keep the dependency suit alive. The plaintiff lost his chance of prosecuting a valid dependency claim (see paras 92–93, 95 & 97).

(3) The plaintiff could not be blamed for not adducing evidence pertaining to his loss of chance. Since, it was the defendant who prevented the plaintiff from adducing relevant evidence at the trial of Suit 20, it was appropriate, fair and just that an adverse inference was drawn against the defendant and to presume, that if the dependency suit had progressed and concluded in the ordinary way, the plaintiff's dependency suit would have been allowed. The defendant was liable for professional negligence for what he did and did not do. There was no evidence to suggest that the plaintiff had abandoned the claim for dependency. As such, the JC was plainly wrong, and appellate intervention was therefore warranted in the circumstances. In the circumstances, the plaintiff had proven on a balance of probabilities that, but for the defendant's negligence, the dependency suit would have been allowed and that the plaintiff would have obtained damages for loss of dependency (see paras 106, 108, 111 & 113).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('plaintif') terhadap keputusan pesuruhjaya kehakiman yang bijaksana ('JC') Mahkamah Tinggi dalam menolak tuntutan plaintif melalui guaman Mahkamah Tinggi Shah Alam ('Guaman 20'). Guaman 20 pada dasarnya adalah tuntutan untuk kecuaian profesional dan pelanggaran kontrak terhadap responden ('defendan') yang merupakan seorang peguambela dan peguamcara. Anak perempuan plaintif meninggal dunia pada 15 September 2008 akibat kecederaan kepala yang teruk dalam kemalangan kenderaan bermotor, yang berlaku pada 14 September 2008. Defendan diminta melalui tout melalui satu surat untuk memfailkan tindakan tanggungan bagi pihak plaintif. Defendan tidak bertemu dengan plaintif dan tidak mengambil deposit untuk yuran dan perbelanjaan. Plaintif tidak

melaksanakan waran untuk bertindak terhadap defendan. Walaupun begitu, pada 12 September 2011, defendan memfailkan tuntutan bagi pihak plaintif untuk tanggungan ('tuntutan tanggungan'). Namun, pada 6 Oktober 2011 tuntutan tanggungan dibatalkan kerana tidak hadirnya peguam dalam pengurusan kes pertama di hadapan Pendaftar. Plaintif menyaman defendan kerana kecuaian profesional dan pelanggaran kontrak melalui Guaman 20. Setelah perbicaraan penuh, JC menolak Guaman 20 dengan alasan, antara lain, bahawa tidak ada hubungan peguam-klien antara plaintif dan defendan. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Defendan memikul tanggungjawab sebagai peguambela dan peguamcara ketika beliau memfailkan tuntutan tanggungan untuk dan bagi pihak plaintif. Defendan bersetuju dan memfailkan tuntutan tanggungan berjumlah 'retainer tersirat' dan menimbulkan hubungan peguam-klien antara defendan (peguam) dan plaintif (klien). Ketiadaan waran untuk bertindak tidak menghalang retainer tersirat. Dan, setelah ada retainer, defendan berkewajiban melindungi kepentingan plaintif. Ini tidak kira sama ada plaintif telah membayar sebarang bayaran kepada defendan atau sama ada plaintif dapat dihubungi atau sama ada peguam telah bertemu dengan plaintif. Oleh itu, defendan tidak dapat menolak atau menafikan bahawa plaintif adalah kliennya pada setiap masa yang material (lihat perenggan 88–91).

(2) Ini adalah kes mudah mengenai kegagalan peguam hak untuk melindungi kepentingan kliennya dengan tidak menghadiri pengurusan kes yang mengakibatkan tuntutan tanggungan dibatalkan. Defendan tidak melaksanakan tugasnya terhadap kliennya sebagai plaintif dalam hal melindungi kepentingan plaintif. Yang harus dilakukan oleh defendan adalah hadir di pengurusan kes dan mendapatkan tarikh pengurusan kes yang lanjut sehingga sementara itu urusan dapat diselesaikan. Tidak ada jejak kertas untuk menunjukkan bahawa defendan melakukan apa yang perlu untuk menjaga tuntutan tanggungan aktif. Plaintif kehilangan peluang untuk menuntut tuntutan tanggungan yang sah (lihat perenggan 92–93, 95 & 97).

(3) Plaintif tidak boleh disalahkan kerana tidak mengemukakan bukti berkaitan dengan peluangnya yang hilang. Oleh kerana, defendan yang menghalang plaintif mengemukakan bukti yang relevan pada perbicaraan Guaman 20, adalah wajar, adil dan saksama bahawa inferens bertentangan dibuat terhadap defendan dan untuk menganggap, bahawa jika tuntutan tanggungan telah dilanjutkan dan disimpulkan dengan cara biasa, tuntutan tanggungan plaintif akan dibenarkan. Defendan bertanggungjawab atas kecuaian profesional atas apa yang dilakukannya dan tidak dilakukannya. Tidak ada bukti yang menunjukkan bahawa

plaintif telah meninggalkan tuntutan tanggungan. Dengan demikian, JC jelas salah, dan oleh itu campur tangan rayuan dibenarkan dalam keadaan tersebut. Dalam keadaan tersebut, plaintif telah membuktikan pada imbangan kebarangkalian bahawa, atas kecuaian defendan, tuntutan tanggungan akan dibenarkan dan bahawa plaintif akan mendapat ganti rugi kerana kehilangan kebergantungan (lihat perenggan 106, 108, 111 & 113).]

Cases referred to

Gurbachan Singh Bagawan Singh & Ors v Vellasamy Pennusamy & Other Appeals [2015] 1 MLJ 773; [2015] 1 CLJ 719; [2015] 2 AMR 1, FC (folld)
Hijau Biru Envirotech Sdn Bhd v Tetuan Dzahara & Associates & 2 Ors [2020] 5 MLJ 549; [2020] AMEJ 0885; [2020] MLJU 1201; [2021] 1 CLJ 186, CA (refd)
Lucy v W T Henleys Telegraph Works Co Ltd (ICI Ltd, Third Party); Wild v Siemens Brothers & Co Ltd [1970] 1 QB 393; [1969] 3 All ER 456; [1969] 3 WLR 588, CA (refd)
Maelstrom Resources Sdn Bhd and Anor v Shearn Delamore & Co (disaman sebagai firma) [2006] MLJU 473; [2007] 1 CLJ 50, HC (refd)
Migotti v Colvill (1879) 4 CPD 233 (refd)
Muhamad Jafri bin Jantan & Ors v Zainal bin Md Rais [2005] 2 MLJ 318; [2005] 1 CLJ 694; [2005] 1 LNS 8, CA (refd)
Ng Shiuh Huei v Asset First Sdn Bhd & Anor [2014] 3 CLJ 1064; [2013] 1 LNS 715, HC (refd)
Pang Yeow Chow v Advance Specialist Treatment Engineering Sdn Bhd [2015] 1 MLJ 490; [2014] 8 CLJ 188; [2014] 1 LNS 1016, CA (refd)
Shearn Delamore & Co v Sadacharamani a/l Govindasamy [2017] 1 MLJ 486; [2016] 6 AMR 797; [2016] AMEJ 2143; [2017] 2 CLJ 665, CA (refd)
Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor [2017] 4 MLJ 207; [2017] 6 CLJ 368; [2017] AMEJ 0298, CA (refd)

Legislation referred to

Civil Law Act 1956 ss 7, 7(3)(ii), 7(5), 73(iv)(d)
Interpretation Acts 1948 and 1967 s 3
Road Transport Act 1987 s 96(2)
Rules of Court 2012 O 64 r 4
Subordinate Courts Act 1948 s 65(1)

Appeal from: Suit No B-23NCVC-20–09 of 2017 (High Court, Shah Alam)

Manian K Marappan (Gajelan Rajakumar with him) (Manian K Marappan & Co) for the appellant.
Lam Chong Seng (CS Lam & Co) for the respondent.

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal (by the plaintiff) against the decision of the learned judicial commissioner ('the JC') of the High Court at Shah Alam dated 11 October 2019 dismissing the plaintiff's claim per Shah Alam High Court Suit No BA-23NCVC-20–09 of 2017 (with costs of RM40,000) ('Suit 20'). Suit 20 (which was filed on 13 September 2019) is essentially a claim for professional negligence and breach of contract against the defendant who is an advocate and solicitor. For the sake of convenience and brevity, we shall refer to the appellant and respondent as 'plaintiff' and 'defendant' respectively.

[2] The starting point in the narrative is a tragic road accident involving the plaintiff's daughter. The accident took place on 14 September 2008. She died on 15 September 2008 as a result of the injuries sustained in the motor accident. The defendant was asked (through a tout) to file a dependency action. The tout via a letter dated 4 August 2011 gave express instructions for the suit to be filed.

[3] On 12 September 2011, the defendant filed a claim (on behalf of the plaintiff) for dependency under s 7 of the Civil Law Act 1956 (Revised 1972) (Act 67) ('the CLA') via Shah Alam High Court Suit No 22NCVC-1027–09 of 2011 ('the dependency suit'). The last date to file the dependency claim was 14 September 2011.

[4] Before filing the dependency claim, the defendant had not met the plaintiff and did not collect any deposit towards fees and disbursements. The plaintiff had not executed a warrant to act in favour of the defendant.

[5] However, on 6 October 2011 the dependency action was struck out due to counsel's non-attendance at the first case management before the registrar. The appeal before us arises out of the defendant's handling, or mishandling, of the dependency suit. The plaintiff sued the defendant for professional negligence and breach of contract (via Suit 20). After a full trial, the JC dismissed Suit 20 on the basis, inter alia, that there was no solicitor-client relationship between the plaintiff and the defendant.

[6] As a preliminary observation, we find it necessary to state that it is rather curious that the dependency suit was filed in the High Court when it should have been filed in the sessions court. No doubt, the High Court has unlimited monetary jurisdiction for all civil actions. However, the defendant ought to have been aware that under s 65(1) of the Subordinate Courts Act 1948 (Revised 1972) (Act 92) the sessions court has 'unlimited jurisdiction to try all

actions and suits of a civil nature in respect of motor vehicle accidents'. A

[7] However, the filing of the dependency suit in the High Court is not the problem, as the action could have been transferred to the sessions court without any difficulty. The problem lies in the fact that the dependency suit was 'short-lived'. It was short-lived because of what the defendant did not do. B

[8] Although, the defendant filed the dependency suit on 12 September 2011, he did not extract the sealed copy of the writ of summons. The first case management was on 6 October 2011. The evidence at the trial of Suit 20 disclosed that the defendant was aware of the case management date. On that day, the registrar of the High Court waited until 5pm. C

[9] The defendant did not appear before the registrar. He also did not write to the registrar to vacate the case management date and seek a longer date to get all the information, details and documents to amend the statement of claim or alternatively to hand over the matter to another solicitor or at least to sort out matters with the tout. D

[10] Ultimately, nothing was done to preserve the dependency suit and it was rather unfortunately struck out on 6 October 2011. There is no evidence that the plaintiff was aware that the dependency suit was struck out. He came to know about it very much later, ie, after he had appointed new solicitors to take over the matter from the defendant. E

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[11] The appeal pivots on the issue of whether there was a *solicitor-client relationship* between the plaintiff and the defendant. Consequently, the main question is whether an advocate and solicitor ('the solicitor') who takes 'instructions' from a tout or acts at the behest of the latter and files a running-down action without meeting the client and without collecting any deposit towards fees or disbursements can subsequently disavow that there was any 'solicitor-client' relationship with the party who is named as plaintiff in the action. G

[12] Consequently, in such a situation the corollary question is whether the said solicitor owes any duty of care to the plaintiff in the said action. Since the factual matrix of the present appeal involves the activities of a tout, we feel compelled to state that this judgment should not be construed or understood, as an express or tacit form of judicial acquiescence to the rampant and nefarious practice of touting. Touting in all its forms and manifestations is prohibited by law and has grave consequences to the solicitor and others involved. H I

[13] In this regard, we note that the Malaysian Bar has taken upon itself to express the view that touting is a menace. In a press release by the Malaysian Bar

dated 27 August 2019 under the heading 'Stricter Enforcement Against Touting', the Malaysian Bar described 'touts' as 'persons who receive commissions from law firms in return for securing clients for the law firms'. According to the press release, 'Touting is abhorrent to the legal profession and detrimental to the public interest, and the Malaysian Bar views touting seriously'.

[14] The Malaysian Bar's press release goes on to state that 'Section 15A of the Minor Offences Act 1955 which states that any person who is found guilty of 'touting' shall be guilty of an offence punishable with a fine not exceeding RM500 or with imprisonment for a term not exceeding six months or to both'.

[15] As the implications to an advocate and solicitor, the press release states, 'For Members of the Bar, touting amounts to professional misconduct by virtue of Section 94(3)(h) of the Legal Profession Act 1976 and Rule 51 of the Legal Profession (Practice and Etiquette) Rules 1978. The Member can be subject to disciplinary action, which may result in various sanctions, including he/she being suspended or struck off the Roll. As regards touting by Court officials and the police, such conduct amounts to an abuse of their public office and enters the realm of corruption offences'.

[16] We shall turn now to the appeal. On 30 November 2020, we allowed the plaintiff's appeal and made a consequential order to allow the plaintiff's claim on terms as appearing in para [117] of this judgment. These are the reasons for our decision.

BACKGROUND

[17] The plaintiff's late daughter, Ms Lee Chu Ling ('the deceased') died on 15 September 2008 as a result of horrific head injuries sustained in a motor-vehicle accident, which occurred on 14 September 2008. She was 27 years old when she died. She was single at that time.

[18] Pursuant to s 7(5) of the CLA, the claim by the lawful dependents for loss of dependency must be brought within three years after the death of the person deceased. According to s 3 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) (Act 388), 'year' means 'a year reckoned according to the Gregorian calendar'.

[19] In *Migotti v Colvill* (1879) 4 CPD 233 at p 238, Brett LJ explained 'month' according to the Gregorian calendar. He said:

> The term a calendar month is a legal and technical term ... The meaning of the phrase is that, in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days; and that one calendar month's

imprisonment is to be *calculated from the day of imprisonment to that day in the following month less one*. (Emphasis added.)

[20] By parity of reasoning, the same definition would apply to 'years' according to the Gregorian calendar. Hence, three years from 15 September 2008 would be the same date three years later, less one day — 14 September 2011. The deceased died on 15 September 2008. As such, the last date for the filing of any dependency claim would be 14 September 2011. In this case, the defendant filed the dependency suit on 12 September 2011, ie, within time. But, that's as far as it goes.

[21] The deceased was at the material time a passenger in motorcar No WLY 3665. The driver of motorcar No WLY 3665 was one Hew Kok Poh. During the trial of Suit 20, it was suggested to the defendant that the driver of the motorcar was actually one Yu Kok Po.

[22] But the identity of the driver of motorcar No WLY 3665 is of no great consequence in the present context as events overtook the dependency suit. The other vehicle which was involved in the accident was motorcar No WQJ 21.

[23] The driver of motorcar No WQJ 21 was Azlan Cameron B Aziz ('Azlan'). The owner of motorcar No WQJ 21 was Mdm Carmel Murphy Ayob ('Mdm Carmel'). The insurers of motorcar No WQJ 21 were Takaful Ikhlas Sdn Bhd ('the insurers'). Mdm Carmel and the insurers were named as the first defendant and second defendant respectively in the dependency suit.

[24] The defendant had (erroneously) pleaded in the statement of claim that Mdm Carmel was the *driver* of motorcar WQJ 21. Although Azlan was in fact the driver of motorcar No WQJ 21, he was not named as a defendant in the dependency suit. The inclusion of the insurers as a defendant in the dependency suit is puzzling as the insurer is not the tortfeasor.

[25] At any rate, the failure to cite Azlan as a party to the dependency suit would have been problematic because of the limitation issue. This is because any attempt by way of an amendment (after 14 September 2011) to include Azlan as a co-defendant would have been met with the objection that a party may not be added after the action has become time-barred (see: *Lucy v W T Henleys Telegraph Works Co Ltd (ICI Ltd, Third Party); Wild v Siemens Brothers & Co Ltd* [1970] 1 QB 393; [1969] 3 All ER 456; [1969] 3 WLR 588 (CA)).

[26] At this juncture, it is relevant to make mention of the financial implications to the insurers of motorcar No WQJ 21 arising from the dependency suit. In this regard, if liability is established against the insured,

then the insurer would become liable to pay on any judgment that is obtained in the dependency suit.

[27] But, the insurer's liability to pay only arises only if notice under s 96(2) of the Road Transport Act 1987 is given. In this case, the defendant filed the dependency suit without giving the requisite statutory notice under s 96(2) of the Road Transport Act 1987 to the insurers. Section 96(2) reads as follows:

> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.
>
> (2) No sum shall be payable by an insurer under subsection (1) —
>
> (a) in respect of any judgement, *unless before or within seven days after the commencement of the proceedings in which the judgement was given, the insurer had notice of the proceedings*; (Emphasis added.)

[28] The statutory notice under s 96(2) must be given prior to the filing of the action, or within seven days thereafter. Thus, the failure to do so would mean that any judgment obtained against Mdm Carmel vis a vis the dependency suit would not be enforceable against the insurers. If Mdm Carmel is not a person of any financial means, any judgment that is obtained against her would be a 'paper judgment'.

[29] During the trial, the defendant admitted that he was not aware of the need to give the statutory notice to the insurers with regard to the filing of the dependency suit. In the dependency suit, it was (erroneously) stated that the deceased was the 'driver' of motorcar No WLY 3665 when in fact she was only a passenger. It is also stated that the dependency claim was being made by the plaintiff as well his 'wife' who was not named in the cause papers.

[30] The plaintiff's wife ie, the deceased's mother, Mdm Ng Siu Tin ('Mdm Ng') left the plaintiff when the deceased was 13 years old. She had re-married and has a family of her own. On the facts, Mdm Ng was not a dependent of the deceased for purposes of s 7 of the CLA. But, given that the deceased did not have all the information when the dependency suit was filed, he may be excused for some of the lapses pertaining to the contents of the statement of claim.

[31] The plaintiff's narrative is that after the death of the deceased, his relative Ms Soo Wan Yin ('PW1') introduced him to one Foo Tiang Kuang ('Foo') in respect of filing an action pertaining his daughter's death. Foo did not testify in Suit 20. The plaintiff's son, Lee Ping Chong ('PW2') testified. The plaintiff was the third witness and he is described as ('PW3').

[32] PW1 testified that she introduced Foo to the plaintiff to help in making a claim for loss of dependency. Sometime in October 2008, PW2 and PW3 met Foo, who was purportedly attached to a law firm, namely, Messrs Louis KH Wong & Co ('LKHW').

[33] It was later established that Foo was not an advocate and solicitor. Foo was, to put it bluntly, a 'tout' for accident cases. It seems quite apparent from the factual matrix that Foo is accustomed to farming out accident cases to firms other than LKHW. The defendant's firm appears to be one such firm.

[34] The plaintiff had signed a warrant to act and had appointed LKHW to act on his behalf vis a vis the dependency claim. The warrant to act reads as follows:

> In the matter of motor vehicle accident on 14th September 2008 involving vehicle Nos. WLY 3665 and WQJ 21
>
> *WARRANT TO ACT*
>
> *I LEE KUANG GUAT (NRIC NO. 490629-01-5117) of Kg. PT. Kassim, MK. 6, Tokong Pechah, 83000 Batu Pahat, Johor do hereby authorized and appoint M/S. LOUIS K.H. WONG & CO. ADVOCATES & SOLICITORS OF SUITE 405, 4TH FLOOR, SUN KOMPLEKS, JALAN BUKIT BINTANG, 55100 KUALA LUMPUR* to be my Solicitors to act for me for the purpose of of [sic] legal proceedings in respect of the above matter.
>
> Dated this day of

[35] It should also be mentioned that soon after the death of the deceased, a law firm by the name of Messrs G Dorai & Co had issued a letter of demand to Mdm Carmel. There is no evidence that the plaintiff had executed a warrant to act in favour of Messrs G Dorai & Co. The circumstances by which the said law firm were retained (if at all) to issue the letter of demand are murky. In his affidavit, Foo states that the plaintiff had appointed Messrs G Dorai & Co on his own.

[36] At any rate, the letter of demand by Messrs G Dorai & Co reads as follows:

> Date: 29th September, 2008
>
> Madam Carmel Murphy Ayob No. 6, Jalan 5/49,

46000 Petaling Jaya

Dear Sirs,

RE: OUR CLIENTS : LEE CHU LING (DECEASED)

DATE OF ACCIDENT : 14.9.2008

YOUR M/VEHICLE : M/CAR NO. WQJ 21

OUR CLIENTS M/VEHICHLE : M/CAR NO. WLY 3665

We act for Mr. Lee Kuang Guan the lawful father and dependant of Lee Chu Ling (deceased) who was injured and subsequently passed away as a result of the above accident.

By reason of your servant and/or agent's negligence in driving your m/car No. WQJ 21 abovementioned, deceased was killed our clients suffered, loss and expense.

Please let us know whether you are prepared to admit liability and settle our clients' claim.

Pease [*sic*] take note that unless we hear from you or your insurers within the next seven (7) days, our client instructions are to commence legal proceedings against you without any further reference to you.

Thank you. Yours faithfully,

cc. Encik Lee Kuang Guat

No. 30, Jalan Perdana 2/26, Pandan Perdana,

55300 Kuala Lumpur.

[37] Foo 'used' LKHW to apply for the post mortem report from Hospital Universiti Kebangsaan Malaysia. This is an appropriate juncture to mention the pertinent fact that LKHW had ceased to operate with effect from 1 January 2008. Thus, it is anybody's guess as to how Foo could have used LKHW to apply for the post-mortem and other associated documents from the relevant authorities.

[38] It follows that the warrant to act which was signed by the plaintiff (quite possibly sometime in October 2008) appointing LKHW to act in the matter, would be invalid and there was no such law firm under the name and style of LKHW at that time. At any rate, from October 2008 until September 2011 there were no further meetings between Foo and PW3.

[39] In the meanwhile, the dependency claim was at risk of becoming time-barred. It is not clear why Foo waited until 4 August 2011 to initiate the action. Foo asked the defendant to urgently file a dependency suit to prevent the claim from becoming time-barred.

[40] The defendant asked for instructions in writing. Foo issued a letter dated 4 August 2011 (exh D13).

[41] The defendant proceeded to file the dependency suit on 12 September 2011.

[42] Foo's letter (in its original form — without any editing) reads as follows:

T.K. FOO

C/o Messrs Louis K.H. Wong

Suite 4.05, 4th Floor, Sun Complex

Jalan Bukit Bintang

50000 Kuala Lumpur

Date:- 4/8/2011

Mr. Chiang Woei Chien

Messrs Chiang Chambers

No. 25.3, Jalan PJU 5/3, PJU 5

Dataran Sunway, Kota Damansara

47810 Petaling Jaya

Dear Sirs,

RE :- FILE AN ACTION IMMEDIATELY

CLIENT:- LEE KUANG GUAT

1. I refer to the above matter and want to inform you that Mr. Lee Kuang Guat has appointed Messrs Louis K.H. Wong to initiate a legal proceedings for the death of her daughter.

2. Enclosed please find the following documents given by Mr.Lee

2.1 Various police reports;

2.2 Original Medical Report;

2.3 Original warrant to act (undated) singed by Mr. Lee.

Our instructions from Mr. Lee is to file the suit and thereafter to amend the suit after obtaining additional and/or accurate information from Mr. Lee. The reason for doing this is that the limitation period to initiate legal proceedings will be expiring soon. By doing so, we can actually stop the limitation and amendment is allows in court.

Please attend to this immediately.

A Your Faithfully

T.K. Foo

B **[43]** As we mentioned earlier, the dependency suit was filed within time. But that is probably the only thing that was right about the dependency suit. However, to be fair to the defendant he filed the dependency somewhat blindly as he only had some documents and fragments of information. What he had in hand, was whatever that was supplied by Foo (per exh D13).

C **[44]** Indeed, he had not even met PW3. There is no doubt that PW3 did not sign any warrant to act to authorise the defendant to file the dependency suit. There was no further follow up with the defendant. The defendant's position is that he contacted Foo and the latter told him that he could not contact the plaintiff. According to the defendant, Foo believed that the plaintiff had
D appointed another law firm to handle the matter.

[45] Hence, as far as the defendant is concerned, since he did not receive any documents or further instructions, he assumed that the plaintiff had
E 'abandoned' the dependency claim.

[46] Around October/November 2016, PW3 and PW2 contacted Foo about the status of the dependency claim. Foo told them to look for the defendant. They then went and met up with the defendant at his office. They
F met outside the defendant's office. It was a short meeting. He told them that the claim was time-barred. They nevertheless insisted on giving him some documents since they had come all the way from Batu Pahat, Johor. He accepted the documents.

G **[47]** By late 2016, the plaintiff had appointed Messrs Manian K Marappan & Co to file Suit 20. Before Suit 20 was filed, Messrs Manian K Marappan & Co wrote to the defendant and said that they had been instructed to take over the matter.

H Your Ref : Please Advise

Manian K. Marappan & Company

Our Ref : MKM/BP/VM/2016

Date : 19.12.2016

I Messrs Chiang Chambers

Advocates & Solicitors,

No 25-3, Jalan PJU 5/3, Dataran Sunway

Kota Damansara,

47810 Petaling Jaya, Selangor.

Dear Sirs,

Re: Fatal Accident to Lee Chun Ling Nric No. 810925-01-5234 On 15.09.2008

We are the Solicitors for Mr Lee Kuan Guat of No 30, Jalan Perdana 2/26, Pandan Perdana, 55300 Kuala Lumpur.

We are instructed that our client's daughter was involved in a Fatal Accident on 14.09.2008, involving motor car No WLY 3605 at Sungai Besi, Kuala Lumpur.

We are also instructed that *our client had instructed you to make a third party Insurance claim*.

We are now has instructed to take over the conduct of this matter.

If you have no objections, then please let us have all the relevant documents.

Yours faithfully,

Manian K. Marappan & Company (written by Manian K. Marappan)

C.c Client

(Emphasis and underlining added.)

[48] The defendant's response is quite telling. His letter in reply states as follows:

CHIANG CHAMBERS ADVOCATES & SOLICITORS

Ref:CWC/0088/l17/11-01

Date: 4/1/2017

Manian K. Marappan & Company

Suite 7-02, 7th Floor

Wisma Sing Long

No. 9, Jalan Zabedah

83000 Batu Pahat

Johor

Dear Sirs,

RE: TAKE OVER CONDUCT OF FILE

IN THE HIGH COURT OF MALAYA AT SHAH ALAM

GUAMAN NO : YET TO BE GIVEN

PLAINTIFF : LEE KUANG GUAT

DEFENDAN : MADAM CARMEL MURPHY AYOB & 1 OTHER

1. We refer to the above matter and to your letter dated 19/12/16.

2. We have no objection to you *taking over the conduct of the aforesaid file.*

3. Enclosed please find the following documents for your record and further action:-

3.1 Original Pengaduan Polis;

3.2 Original Medical Report;

3.3 Original Writ Saman dan Pernyataan Tuntutan (together with receipt of payment);

3.4 Copy of the deceased payslip (recently obtained from family of deceased);

3.5 Copy of the e-BE of the deceased (recently obtained from family of deceased).

4. We like to put on record that we have not serve any document on the Defendant as *we have not extracted the sealed copy of the Writ* and Pertnyataan [*sic*] Tuntutan and we are of the opinion that *this file can be revive should it been strike out*.

5. We like to further state that we didn't have the contact number of *our mutual client* and we have only been instructed by one Mr. Foo who we are now unable to contact.

Yours Faithfully,

FOR MESSRS CHIANG CHAMBERS

CHIANG WOEI CHIEN (MR)

(Emphasis and underlining added.)

[49] During the trial of Suit 20, the plaintiff called three witnesses. They are, Ms Soo Wan Yin (PW1), Lee Ping Chong (PW2) and the plaintiff (PW3). The defendant ('DW1') testified on his own behalf. Foo did not testify.

[50] During the trial of Suit 20, counsel for the plaintiff tried to call all the witnesses in relation to dependency claim. These witnesses would have given evidence in relation to the (accident) liability and as to the earnings of the deceased.

[51] These are matters which are relevant to the issue of 'loss of chance' (see *Pang Yeow Chow v Advance Specialist Treatment Engineering Sdn Bhd* [2015] 1 MLJ 490; [2014] 8 CLJ 188; [2014] 1 LNS 1016 (CA)). The witnesses who the plaintiff intended to call were as follows:

(a) Nik Nor Azlizam bin Nik Norizam — income-tax officer;

(b) ASP Robiaton bt Razali — investigating officer;

(c) Prof Madya Dr Faridah bt Mohd Nor — forensic pathologist; and

(d) Hew Kok Poh (driver).

[52] However, the defendant's counsel objected to the calling of these witnesses and the objection was upheld by the JC. As such, the plaintiff was prevented from adducing evidence in relation to the accident liability, and as to the earnings of the deceased.

[53] Before the start of the trial, the defendant attempted to strike out Suit 20. The attempt was unsuccessful. However, it is noteworthy that Foo provided two affidavits to bolster the defendant's application. *Foo's first affidavit was affirmed on 16 November 2017* and reads as follows:

> Saya, Foo Tiang Kuang (K/P: 550825-01-5933), adalah seorang warganegara Malaysia yang cukup umur dengan alamat pemyampaian [sic] di No. 202-02-02 Pangsapuri Sri Bandar Besi, Jalan Sg Besi 1/89C, Batu 2½, 57100 Kuala Lumpur dengan sesungguhnya berikrar dan mengatakan seperti berikut seperti berikut [*sic*]:-
>
> 1. Saya adalah *pekerja di Tetuan Louis K H Wong & Co pada masa material* dan pekerja yang mengendalikan fail transaksi antara Plaintif dan Defendan tersebut dalam tindakan ini dan saya mendandatangani [*sic*] affidavit ini dengan tujuan menyokong permohonan Chiang Woei Chien untuk membatalkan tindakan plaintif ini dan saya mempunyai kuasa sepenuhnya untuk mengikrar Afidavit ini.
>
> ...
>
> 4. Mengikut rekod fail dan ingatan saya, saya berikrar dan sesungguhnya ingin berkata berikut:-
>
> 4.1 Pada waktu material, Plaintif telahpun menandatangani 'Warrant To Act' bertujuan melantik firma saya yang saya sedang bekerja dengan, iaitu Tetuan Louis KH Wong & Co ('Tetuan Louis Wong') untuk menolong Plaintif untuk memfailkan tuntutan estet anak perempuan Plaintif yang meninggal dunia akibat satu kemalangan berlaku pada 14.9.2008;
>
> 4.1.1 anak perempuan Plaintif mati pada 15.9.2008.
>
> 4.2 *Tanpa pengetahuan saya pada waktu itu, Plaintif juga melantik Tetuan G Dorai & Co sebagai peguamnya.*
>
> 4.3 Pada hemat saya, 'Warrant To Act' tersebut cukup memberi Firma saya satu otoriti jelas dan berkesan untuk bertindak bagi pihak Plaintif; dan sekaligus berkuasa ('prevailed over') ke atas Tetuan G Dorai & Co.
>
> 4.4 Selepas 'Warrant To Act' tersebut ditandatangani oleh Plaintif, Plaintif mengambil masa agak lama untuk membekalkan kepada saya beberapa dokumen relevan mengenai tuntutan estet tersebut; antara yang lain, adalah laporan polis, laporan perubatan, sijil kematian, lakaran pelan dan lain lain [*sic*] (yang akan disebut diesibitkan dalam ini sila rujuk perenggan 5 dibawah ini).

A 4.5 Sejurus memperolehi dokumen relevan tersebut, dan *disebabkan kesibukan firma saya, saya melantik/mengarahkan Tetuan Chiang Chambers untuk memfailkan tuntutan plaintif demi untuk menghentikan Had Masa 3 tahun (3 years Limitation time); justeru itu, saya mengisukan satu surat bertarikh 4/8/2011 kepada Tetuan Chiang Chambers untuk menolong firma saya untuk memfailkan tuntutan Plaintif*.

B 4.5.1 Saya difahamkan oleh *Tetuan Chiang Chambers bahawa beliau memang mengikut arahan saya untuk memfailkan satu writ saman* di Mahkamah Tinggi Shah Alam Guaman No. 22NCVC-1027-09/2011 ('Tuntutan Plaintif tersebut') pada 12.9.2011.

C 4.6 *Selepas pemfailan Tuntutan Plaintif tersebut, Plaintif tidak dapat dihubungi dan/atau Plaintif tidak menghubungi saya. Ini memberi satu implikasi kepada saya bahawa Plaintif mungkin meneruskan tuntutannya dengan peguamcara lain seperti Tetuan G Dorai & Co*.

D 4.7 Sehingga lebih kurang bulan Januari–Februari 2017, En Chiang Woei Chien (En Chiang) berjumpa dengan saya dan menunjukkan satu surat Tetuan Manian K Marappan & Company dan surat balas Tetuan Chiang Chambers, saya mengingatkan En Chiang bahawa Plaintif sebenarnya melantik Tetuan Louis Wong sebagai peguam memfailkan Tuntutan Plaintif tersebut dan bukannya Firma En Chiang kerana 'Warrant To Act' yang ditandatangani oleh plaintif.

E 4.8 *Saya terasa sekiranya Plaintif ingin membuat aduan, beliau sepatutnya komplen terhadap Tetuan Louis Wong dan bukannya Tetuan Chiang Chambers kerana Plaintif yang melantik Tetuan Louis Wong; dan Tetuan Louis Wong melalui surat saya bertarikh 4/8/2011 yang mengarahkan Tetuan Chiang Chambers untuk memfailkan Tuntutan Plaintif tersebut.*

F 4.8.1 Akan tetapi, aduan Plaintif ini yang telah lama (sejak tahun 2011 hingga 2017 — 6 tahun) bukannya kesalahan peguam semata mata; tetapi kelakuan dorman Plaintif dan tindakan tidak bersungguh sungguh untuk meneruskan tuntutan estet anak perempuannya (sejak kematian 15.9.2008) Plaintif pula yang perlu ditegur dan salah kerana kelewatan sendiri.

G 5. Demi menyokong pengataan [sic] saya tersebut dari perenggan 4, 4.1 hingga 4.8.1 di atas ini, saya mengemukakan salinan dokumen berikut dan dilampirkan bersama-sama di sini dan ditanda secara kolektif sebagai Eksibit 'FTK-1':-

H (a) Surat Tetuan G Dorai & Co bertarikh 29.9.2008;

(b) Sijil Kematian bertarikh 15.9.2008;

(c) Permit Menguburkan;

(d) Warrant To Act;

I (e) Resit Pusat Perubatan Universiti Malaysia BA 61233;

(f) Rajah Kasar oleh Robiaton Bt Razali;

(g) Laporan Polis K060309/2008 & Laporan Polis K058664/2008 & K058525/2008 & K058570/2008;

(h) Laporan Post Mortem oleh Dr Faridah Mohd Nor dari Unit Forensik Fakulti perubatan bertarikh 15.9.2008;

(i) Surat TK Foo bertarikh 4/8/2011.

6. Atas dasar fata fakta yang tersebut di atas ini, saya menyokong permohonan Defendan dan Afidavit Sokongan Chiang Woei Chien yang difailkan bersama sama di sini untuk membatalkan writ saman Plaintif bernombor BA-23NCVC-20-09/2017. (Emphasis added.)

[54] Foo's second affidavit was affirmed on 14 December 2017 and reads as follows:

1. Saya adalah pekerja di Tetuan Louis K H Wong & Co pada masa material dan pekerja yang mengendalikan fail transaksi antara Plaintif dan Defendan tersebut dalam tindakan ini dan saya medandatangani [*sic*] affidavit [*sic*] ini dengan tujuan menyokong permohonan Chiang Woei Chien untuk membatalkan tindakan plaintif ini dan saya mempunyai kuasa sepenuhnya untuk mengikrar Afidavit ini.

2. Segala fakta yang dideposkan di sini adalah berdasarkan pengetahuan peribadi saya dan/atau berdasarkan rekod-rekod dalam simpanan saya ke atas mana saya mempunyai akses sepenuhnya melainkan dinyatakan sebaliknya.

...

4. Melainkan Plaintif memanglah menandatangani Warrant To Act melantik Tetuan KH Louis Wong & Co, pengataan lain Plaintif dalam perenggan 6,8,9,10,11,12,13 dan 14 Afidavit Jawapan Ke-2 Plaintif (Lampiran 12) adalah tidak disetujui dan/atau saya nafikan dan/atau saya tidak ada pengetahuan langsung. Seterusnya saya berhasrat bertambah kata berikut:-

(a) Saya mengulang kata semua pengataan saya dalam Lampiran 10 dan semuanya dipakai dalam Balasan Afidavit ini; dan

(b) Tandatangan Warrant To Act tersebut mempunyai tandatangan yang consistent dan sama dengan tandatangan Plaintif tercatat dalam bahagian 'Jurat'
Lampiran 12; dan

(c) Surat saya bertarikh 4.8.2011 bukan satu 'afterthought'; surat tersebut memang dikeluarkan oleh saya kepada defendan pada masa material bertujuan khas untuk memberi arahan kepada Tetuan Chiang Chambers untuk memfailkan Writ Saman bagi pihak plaintif untuk menghentikan Tempoh Had Masa (3 tahun) dalam tuntutan estet si mati akibat kemalangan; dan

(d) Saya percayai plaintif tidak pernah bertemu-muka dan/atau berkenalan dengan defendan pada masa material melainkan pada perjumpaan di bulan Oktober 2016 sahaja; pada setiap masa material, plaintif hanya berjumpa dengan saya dan saya mengambil arahan sambal menunggu dokumen relevan dari plaintif khususnya salinan slip gaji bulanan dan/atau Cukai Pendapatan (Income Tax) si mati (yang plaintif selama ini

A tidak dapat membekalkan kepada saya) untuk tujuan tuntutan estet menurut provisi Akta Undang Undang Sivil (Civil Law Act);

5. Saya percayai tuntutan plaintif ini adalah satu tindakan yang salah menamakan pihak defendan (wrongly named) iaitu Tetuan Chiang Chambers tidak pernah dilantik oleh plaintif tetapi Tetuan Chiang Chambers adalah diarahkan oleh saya.

B

6. Atas dasar alasan alasan tersebut di atas, saya menyokong permohonan defendan dalam Lampiran 8.

[55] The next document of importance is the defendant's witness statement C which reads as:

Q.2: What is your relationship with the Plaintiff?

A: I don't know the Plaintiff. I only met him for the first time somewhere in October 2016 when he and another man came to my office in Kota Damansara, Petaling D Jaya. He gave me a stash of documents regarding his estate claim over a fatal accident involving his daughter who unfortunately died around year 2008.

Q.3: Tell us what actually happened and how did you get involved?

A: *Actually, I got involved because I met this guy called Foo Tiang Kuang ('Foo') E sometime in 2011. Foo told me he had a case for me to file in court just to stop the limitation time for a fatal accident claim. The limitation time for a fatal accident is 3 years from date of death. So, what happened was Foo told me he was helping a friend to file an estate claim as the dead involved his friend's daughter who died in the accident. Foo then said he was waiting for his friend to get him more documents but time is running out if a court summons is not filed.*

F

I asked Foo why can't he file himse lf as he w as attached to a law firm by the name of Messrs Louis KH Wong ('Louis Wong'). Foo said he was too busy and had no time to do so.

He wanted me to help him to file just to stop the time first. Once full documents were G supplied by his friend, Foo said I could later apply to amend the facts and figures. So, he gave me some documents and I immediately went back to office and read those documents.

As I was reading those documents, I called Foo then those documents were really insufficient for me to file a complete statement of claims but Foo told me to just file H first because time is running out. So I told Foo to get me an instruction letter to confirm what he wanted me to do. He wrote a letter to me dated 4/8/2011 (see page 71 Ikatan Dokumen Bersama).

Q.4 Did you follow what Foo instructed you to do? And what were those documents Foo gave you? What did you to once you receive those documents?

I

A: Yes, I filed a Writ Summons based on Foo's instruction letter and based on whatever –documents Foo supplied me. You can see those documents (supplied by Foo) from pages 3852 of Ikatan Dokumen Defendan. These documents can also be seen from Ikatan Dokumen Bersama but there are all over Bahagian A and B. What I want to show the Court is what I had actually received from Foo would be seen as

per pages 38–52 Ikatan Dokumen Defendan. No more and no less.

Upon reading those documents, particularly the death certificate, I only got to know Lee Kuang Guat was the father to the dead Lee Chu Ling. And like I'd said, I prepared a statement of claims and filed it together with the writ Summons. If you refer to the Court filing receipt at page 8–10 Ikatan Dokumen Bersama, it will tell I filed it on 12/9/2011.

Q.5: When was the fatal accident occurred? Was your filing of the Writ Summons managed to stop the limitation time?

A: According to those documents esp. the police report, you can tell the accident happened on 14/9/2008. And from the Post Mortem report you can tell the Plaintiff's daughter died on 15/9/2008. So, 3 years starts from 15/9/2008 and expires on 14/9/2011. I filed the Writ Summons on 12/9/2011 — about 2–3 days before the expiry.

So, to answer you, yes, *my filing of the writ summons indeed stopped the limitation period*.

Q.6: What happened next?

A: *I told Foo about the filing of the Writ Summons and he was happy. He then told me to wait for more documents to be supplied by Lee Kuang Guat. Foo confirmed with me his friend was none other than Lee Kuang Guat who is now the Plaintiff here.*

Q.7: What were those 'more documents' about?

A: If I could recall correctly those 'more documents' were the deceased Income Tax Form, salary slips, or letter employment or something that could show the deceased was 'gainfully employed' at the time before her demise.

These documents are necessary for me to file application to amend the Statement of Claim particularly for me to plead or touch up the damages part, e.g. 'Butir Butir Gantirugi Khas' and computation of the loss of earnings and/or loss of support etc.

You can see the Statement of Claim I file at page 34–37 Ikatan Dokumen Bersama, it *did not contain* 'Butir Butir Gantirugi Khas' and computation of the loss of support because Foo did not provide me with those 'more documents' I meant.

I called Foo many times after the filing of the Writ Summons to ask for those 'more documents' but Foo said he is waiting for the Plaintiff to supply him, but the Plaintiff was unable to do so and Foo said he could not do much.

I also asked Foo to pay me some fees and disbursement as I had filed the Writ Summons based on his instructions. Foo pacified me to not worry because the Plaintiff had signed a 'Warrant To Act' to Louis Wong, he will sure pay him.

Q.8 Then?

A: Then when Foo told me the Plaintiff was still unable to supply those more documents, Foo said the Plaintiff also did not pay him, for him to pay me. Foo also said he discovered the Plaintiff had signed several appointment letters to few other law firms, he referred me to a letter issued by Messrs G Dorai & Co dated 29/9/2008 which you can read it at page 37 Ikatan Dokumen Defendan. So, Foo

said very likely the Plaintiff had gone for those other law firms since he did not show interest to supply those documents, and also did not pay legal fees and disbursement.

Based on what Foo told me, I came to a conclusion, then, that the Plaintiff might had gone for other law firms to file same estate claims and would not use Foo and Louis Wong, so I did not extract the Writ Summons.

You can read Foo's Afidavit dated 16/11/2017 which I had exhibited it in my Afidavit sokongan meant for my striking out application (Encl. 8) from page 30–34 Ikatan Dokumen Defendan, and I rely and find support from what he had told me in all his affidavits.

Q.9: Did the Plaintiff actually supplied you those 'more documents'?

A: Yes, but like I'd said earlier, he came to my office sometime October 2016 with another man. That was the first time I met him. In the meeting, he gave me some documents and because I was rushing out for prior appointment, I told Lee Kuang Guat that his estate claim had already been expired since he did not revert back to Foo and did not pay legal fees.

He told me he came from very far and insisted I accepted those documents, so I accepted those documents he gave.

....

Q.11 ...

A: ...

Tetuan Manian Marappan ought to advise the Plaintiff that his estate claim had already expired. Why Lee Kuang Guat took him 2016 (more than 8 years since 2008) to supply those documents is something he has to explain. But to me he is guilty of his own delay.

Who on earth or which father would leave a claim idle whose daughter died in a fatal accident for more than 8 years (since accident in 2008 till 2016)? To my mind every reasonable father would certainly take active actions/steps to pursue the claim and not acted in dormant like Lee Kuang Guat.

Q.12 You do not think you have committed any breach of duty? Why?

A: In my understanding, my answer to you is — yes, *I don't think I have committed any breach of duty. First of all, I owe no duty of care to Lee Kuang Guat. He was not my client. Foo or Louise Wong was. I had never met Lee Kuang Guat at and during the material time. I only met his after the expiry of his claim. He sued and is suing a wrong party*.

In addition, the plaintiff had not only signed a 'Warrant To Act' to Foo or Louis Wong, he also appointed Tetuan G Dorai & Co to try his luck on same estate claim. Who was the real lawyer acting for him? That is for him to explain to the Court.

Secondly, *I was not paid a single cent as lawyer fee from Foo. As I had never met Lee Kuang Guat would never understand what limitation period means to him. There was no client-solicitor relationship between Lee Kuang Guat and me. I had never had any*

meetings nor conversation with Lee Kuang Guat during year 2008–2011. There was only one meeting and it was October 2016. He is definitely not my client. If he was, I would had asked Lee Kuang Guat to pay me. Until today I received no lawyer fee and yet Tetuan Manian Marappan advised the Plaintiff to sue me. This is unfair.

It is unfair because I am now made to stress and depressed for an act of the Plaintiff's own inordinate delay.

Fourthly, because of the Plaintiff's own multiple appointment of several lawyers and his own inordinate delay, any loss he alleges, is definitely NOT caused by me. In fact, his estate claim had already been expired since 2011. How can he now claim loss/damage caused by his own delay and lay blame on me? His present suit against me is utterly unfair.

Finally, if you read those documents that he supplied me in October 2016, it is clear those Income tax form or salary slips were all obtained AFTER the expiry of this estate claim. Why did he not supply these documents to Foo during the material time or before the expiry date is something he must explain to the court.

Q.13 Do you have anything further to say? A: Yes, I do.

First of all, the Plaintiff is not my client at the material time. Secondly, he was the one who first contacted Foo. He gave Foo the documents except the Income Tax and salary slips. I got to know his case through Foo. Without Foo, I would not had filed the Writ Summons. The Plaintiff then did not come back to Foo. Probably he had appointed other lawyers like Tetuan G Dorai & Co. Probably he had appointed other lawyers like Tetuan G Dorai & Co. He did not supply relevant documents to show 'gainfully employed' of his late daughter. But he only gave them to me in October 2016.

Now he claims that because I did not attend court which cause his loss, if his allegation succeeds then I would say that he has used the court and abuse the court process to circumvent his late daughter's liability in the subject fatal accident. How do we know his late daughter did not commit 'contributory negligence' in the fatal accident? Or it could well be his late daughter's fault in the accident? These issues were and had never been tested and proved. But now his lawyer wants to sue me just so that they could avoid proving or no need to prove these issues so that he could get compensation? It is ridiculous. I think his claim of loss has nothing to do with the allegation of negligence here because he is still required in law to prove his actual loss in the said fatal accident.

In other words, his loss (if any) in the fatal accident claim is subject to his late daughter's liability. Any loss was certainly not caused by me whatsoever.

(Emphasis and underlining added.)

THE PLEADINGS

[56] The plaintiff's narrative of the events in relation to the filing of the dependency suit and plea of negligence against the defendant was as follows:

5. Pada sekitar bulan Oktober atau November 2016, Plaintif dan anak ke-2 Plaintif tersebut telah membuat temu janji untuk menjumpa dengan Defendan untuk

memberi dokumen-dokumen seperti slip gaji dan boring cukai pendapatan LHDN kepada mendiang anak perempuan Plaintif tersebut atas permintaan Defendan ('*dokumen-dokumen yang diminta oleh Defendan tersebut*').

a. Semasa Plaintif dan anak ke-2 Plaintif tersebut sampai di pejabat Defendan beralamat di No. 25.3, Jalan PJU 5/3, PJU 5, Dataran Sunway, Kota Damansara, 47810 Petaling Jaya, Selangor, pejabat Defendan adalah berkunci dan Defendan tidak berada di pejabat.

b. Anak ke-2 Plaintif tersebut telah berhubung dengan Defendan dan Defendan telah memberitahu bahawa beliau akan sampai sekejap lagi tetapi beliau adalah sibuk, jadi beliau hanya boleh berjumpa dengan Plaintif selama 5 minit sahaja.

c. Plaintif dan anak ke-2 Plaintif tersebut telah bertunggu di kaki lima di bawah pejabat Defendan. Selepas Defendan sampai di pejabat beliau, Defendan hanya berjumpa dengan Plaintif dan anak ke-2 Plaintif tersebut di kaki lima di bawah pejabat Defendan.

d. Selepas Defendan menyemak dokumen-dokumen yang diminta oleh Defendan tersebut yang ambil masa tidak melebihi 5 minit, Defendan telah memberitahu Plaintif dan anak ke-2 Plaintif tersebut bahawa beliau adalah sibuk dan tidak ada masa untuk berbincang yang selanjut tentang kes tersebut dengan Plaintif.

e. Maka, Defendan tidak meminta sebarang butiran- butiran untuk kes tersebut selain daripada dokumen- dokumen yang diminta oleh Defendan untuk meneruskan kes tersebut.

f. Pertemuan antara Defendan dan Plaintif tersebut adalah hanya satu pertemuan dan tiada pertemuan selepas itu.

g. Walaubagaimanapun, Defendan telah bersetujui melalui tangka laku (conduct) untuk mewakili Plaintif dan Defendan adalah berkewajipan perhatian (duty of care) kepada Plaintif semenjak Defendan bersetujui mewakili Plaintif.

h. Plaintif tidak tahu samada satu surat perwakilian [*sic*] (retainer/warrant to act) telah ditandatangani dan Plaintif akan mengemukakan surat tersebut, jika ada, selepas penzahiran dokumen (*discovery of document*).

i. Tetapi, Defendan memang telah mewakili Plaintif dengan cara berhubung dengan insuran dan/atau peguam insuran dan/atau pemandu bertentangan dan/atau pemilik motokar bernombor WQJ 21.

j. Defendan juga telah memulakan tindakan mahkamah terhadap Madam Carmel Murphy Ayob yang dikatakan adalah pemilik dan/atau pemandu kenderaan WQJ 21 sebagai Defendan Ke-1 dan Takaful Ikhlas Sdn Bhd sebagai Defendan Ke-2 melalui Writ Saman di Mahkamah Tinggi Malaya di Shah Alam dengan Guaman No. 22NCVC-1027-09/2011 pada 12.9.2011

('tindakan tersebut').

Pemandu bertentangan tersebut tidak dimasukkan sebagai salah satu Defendan di dalam tindakan tersebut.

6. Adalah terma tersirat pewakilan tersebut bahawa Defendan berkewajipan kepada Plantif di bawah kontrak untuk menjalankan skil/kemahiran dan perhatian munasabah di dalam pelaksanaan kewajipan beliau (a duty to exercise skill and care in the performance of their duties).

a. Sebagai alternative, Defendan berkewajipan kepada Plaintif di bawah *common law* untuk melaksanakan pekerjaan dan kewajipan professional Defendan dengan standard berhati-hati yang dijangka adalah pengamal undang-undang yang munasabah dalam profesion tersebut (*the standard of care expected is that of a reasonable practitioner in that profession*).

7. Defendan adalah berkewajipan perhatian (duty of care) kepada Plaintif tetapi Defendan telah memungkiri kewajipan perhatian tersebut.

a. Defendan secara jelas memahami bahawa beliau adalah dilantik oleh Plaintif untuk menuntut segala-gala yang boleh dituntut oleh estet atau keluarga mendiang anak perempuan Plaintif tersebut termasuk Plaintif sendiri dan sekiranya perlu, untuk mengambil apa-apa tindakan Mahkamah untuk membuat tuntutan kerana kematian tersebut yang tidak sepatutnya berlaku ('kes tersebut').

i. Plaintif telah menunggu Defendan menjalankan tugasnya untuk beberapa tahun dan setiap kali Plaintif menghubungi Mr Foo dan/atau Defendan, Mr Foo dan Defendan telah memaklumkan Plaintif bahawa kes tersebut masih dijalani dan belum selesai.

ii. Pada atau lebih kurang bulan Februari 2017, Plaintif telah memberi arahan kepada Tetuan Manian K. Marappan & Company untuk membuat siasatan terhadap Defendan dan kes tersebut dan melalui surat Defendan bertarikh 4.1.2017, Defendan memberitahu bahawa beliau telah memfailkan tindakan tersebut tetapi Mahkamah belum mengeluarkan salinan bermeteraikan kes tersebut dan Defendan telah melampirkan satu salinan kertas kausa kes tersebut.

iii. Tetapi salinan tindakan tersebut yang diberi oleh Defendan jelas menunjukkan bahawa kes tersebut telah difailkan dan dimeteraikan oleh Mahkamah Tinggi Malaya di Shah Alam sebagai tindakan tersebut pada 12.9.2011, iaitu beberapa hari sebelum had masa 3 tahun untuk memulakan tindakan tersebut berluput pada 15.9.2011.

iv. Mahkamah Tinggi Malaya di Shah Alam telah menetapkan 6.10.2011 untuk pengurusan kes. Tetapi walaupun tindakan tersebut telah difailkan, Defendan tidak mengambil apa-apa langkah selanjutnya untuk menyerahkan dan memberitahu tindakan tersebut kepada pihak-pihak bertentangan dan menjalan tindakan tersebut sehingga ia diselesaikan.

v. Oleh kerana tiada tindakan yang selanjutnya dibuat oleh Defendan, tindakan tersebut telah dibatalkan pada 6.10.2011 dan tindakan tersebut telah luput.

vi. Maka, Defendan telah memungkiri kewajipan perhatian beliau kepada Plaintif dan telah gagal menjaga kepentingan Plaintif.

8. Selain itu, Defendan sebagai peguamcara kepada Plaintif adalah berkewajipan professional kepada Plaintif di bawah *common law* untuk melaksanakan pekerjaan dan kewajipan professional Defendan di mana sebagai peguamcara Plaintif, standard berhati-hati yang dijangka adalah pengamal undang-undang yang munasabah dalam profesion tersebut (*the standard of care expected is that of a reasonable practitioner in that profession*).

9. Manakala, Defendan telah memungkiri standard berhati- hati yang dijangka sebagai pengamal undang-undang yang munasabah dalam profesion tersebut (*breach of standard of care which expected as a reasonable practitioner in the profession*).

i. Dalam keadaan yang sedia ada, Plaintif tidak boleh lagi menuntut kepada sesiapapun berdasarkan kematian mendiang anak perempuan Plaintif tersebut kerana terhalan oleh undang- undang had masa sejak 15.9.2008 dan Plaintif hanya berhak menuntut terhadap Defendan kerana telah gagal dengan kewajipan kontrak dan/atau *common law*.

....

c. Setelah memfailkan tindakan tersebut, Defendan telah gagal menjalankan tugas kepeguamannya dengan cermat dan munasabah sehingga tindakan tersebut telah diabaikan dan menyebabkan ketiadaan penyerahan kepada pihak yang bertentangan dalam had masa yang tertentu.

d. Setelah memfailkan tindakan tersebut, Defendan telah gagal menjalankan tugas kepeguamannya dengan cermat dan munasabah sehinggan tindakan tersebut telah diabaikan dan menyebabkan tindakan tersebut dibatalkan pada 6.10.2011.

e. Defendan telah gagal menasihatkan dan mendedahkan kepada Plaintif tentang akibat pemfailan lewat tindakan tersebut dan akibat kecuaian mengambil suratan-suratan tindakan tersebut dari Mahkamah dan akibat ketiadaan penyerahan lambat kepada pihak bertentangan.

f. Defendan telah gagal berhubung dengan and [*sic*] memberitahu Plaintif bahawa had masa untuk memulakan tindakan tersebut telah hampir-hampir luput semasa tindakan tersebut difailkan supaya Plaintif akan sedar untuk memantau dengan rapi tindakan dan tugas-tugas Defendan.

g. Defendan telah gagal memberitahu Plaintif bahawa tindakan tersebut telah difailkan dan perlu diserah kepada pihak bertentangan dalam had masa yang singkat supaya Plaintif akan memantau dengan rapi tindakan dan tugas-tugas Defendan.

h. Dengan ringkas, Defendan telah gagal menasihatkan atau memberitahu Plaintif langkah-langkah prosedur yang sepatutnya diikuti supaya Plaintf dapat memahami dan seterusnya memantau tindakan dan tugas-tugas Defendan dengan lebih rapi.

i. Walaupun/sekiranya Plaintif tidak dapat memantau tindakan dan tugas-tugas Defendan dengan rapi, Defendan sebagai peguamcara Plaintif yang memahami undang-undang dan prosedur tindakan tersebut seharusnya memastikan bahawa tindakan tersebut dijalani dengan rapi tanpa pemantauan Plaintif.

j. Defendan sebagai peguamcara Plaintif telah gagal memaklumkan status tindakan tersebut yang benar dan telah berbohong kepada Plaintif bahawa tindakan tersebut masih berjalan sedangkan tindakan tersebut telah dibatalkan pada 6.10.2011.

k. Defendan telah gagal sama sekali untuk bertindak dan bertugas dalam cara yang baik, cermat, munasabah dan professional terhadap Plaintif di dalam atau mengenai tindakan tersebut.

i. Oleh itu, seorang pengamal undang-undang yang munasabah dalam profesion tersebut mengikut standard yang biasanya diikuti di dalam profesion tersebut tidak akan membuat apa-apa kesalahan yang dibuat oleh Defendan yang diplidkan di perenggan 9(i)(a-k) di atas.

10. Akibat kegagalan kontrak dan/atau kecuaian dan/atau kemungkiran standard berhati-hati Defendan seperti yang dikatakan di atas, Plaintif telah kehilangan haknya untuk menuntut pampasan/gantirugi sebagai *dependant* kepada mendiang anak perempuan Plaintif tersebut untuk kematian mendiang anak perempuan Plaintif.

THE DEFENCE

[57] The relevant parts of the defendant's defence read as follows:

3.1 Secara alternative dan/atau tambahan, Defendan mengatakan Plaintif sebenarnya melantik dua atau tiga set peguamcara berlainan. Plaintif tidak pernah melantik Defendan secara formal dan secara langsung.

...

4.1 Seingat Defendan, sekiranya memang benar Plaintif bertemu dengan Defendan (dimana dinafikan) pada sekitar tahun 2016, Defendan akan/telahpun memaklumkan Plaintif dan/atau wakil yang bersamanya bahawa tuntutannya telahpun luput tempoh masa memandangkan Si Mati meninggal dunia pada 15.9.2008.

4.2 Defendan juga beritahu Plaintif dan wakil Plaintif bersamanya bahawa pada setiap masa material Plaintif tidak melantik Defendan secara langsung memandangkan Plaintif sebenarnya dan secara spsifik [*sic*] melantik dan/atau mengarahkan Mr Foo dari Tetuan Louis K H Wong untuk mengendalikan tuntutan Plaintif. Defendan hanya menerima arahan dari Mr Foo (T K Foo) dan Tetuan Louis K H Wong untuk memfailkan tuntutan Plaintif demi untuk menghentikan Tempoh Had Masa (selama tiga (3) tahun untuk kes kemalangan maut) sahaja.

4.3 Tambahan, pada setiap masa material Plaintif tidak pernah menandatangani apa apa surat perlantikan untuk melantik Defendan sebagai peguamnya dan juga tidak membayar apa apa professional fee kepada Defendan. Pada hakikatnya Plaintif sebenarnya menandatangani satu 'Warrant To Act' dengan/bertujuan melantikan Tetuan Louish K H Wong sebagai peguam Plaintif.

4.4 Plaintif tidak pernah berjumpa dengan Defendan pada masa material tahun 2008 hingga 2011, ini menyebabkan Defendan tidak pernah mendapat fakta dan

A 'briefing' yang cukup dan teliti. Maka tiada hubungan peguamcara-klien terwujud/termaktub.

4.5 Defendan mengatakan bahawa terwujudnya 'pepecahan siri transaksi' mengenai Plaintif melantik peguamcara.

B 4.6 Defendan mengatakan tuntutan Plaintif ini juga ber- unsur 'back-door' dan menyalahguna proses mahkamah sedangkan kerugian/gantirugi Plaintif ini adalah bukannya disebabkan oleh dan/atau mempunyai hubungan dengan apa apa kecuaian dan/atau kelakuan Defendan.

....

C 9. *Defendan mengatakan pada setiap masa material, defendan melakukan tindakan secara/sebagai professional berkompeten dan berhati hati dan tidak langusng [sic] memungkiri apa apa kecuaian*. (Emphasis added.)

D HIGH COURT (FINDINGS)

[58] The JC dismissed the plaintiff's claim. The JC's grounds of judgment ('GOJ') may be gleaned from the following paragraphs of the GOJ (which are reproduced below in their original form):

E 12. At all material time, (SP3) met Foo. The witness had never met (SD1). (SD1) came into the picture because of Foo. Foo was the one who instructed (SD1) to file the writ summons for all good intent, i.e. to stop the 3- year limitation period as regards the dependency claim.

F To this effect, (SD1) had insisted Foo to give him a letter which he did with a letter dated 4 August 2011 (D13). Subsequently with this letter (SD1) had filed the writ summons to help Foo to stop the limitation period. At that material time, the Plaintiff did not supply sufficient and relevant documents like Income Tax, salary slips and others which could show 'gainfully employed' of the deceased under the dependency claim, as a result the statement of claim so filed was obviously G incomplete. It was meant to do an amendment application once those relevant documents were supplied, to touch up the 'void gap' so to speak. Having considered (D13) at length, to my mind a solicitor-client relationship was created between (SD1) and Foo.

H The Plaintiff had not proved any linked with (SD1) prior to the filing of the writ summons. During cross- examination, (SP3) himself admitted and agreed that he did sign some documents when he met Foo. This include document 'Warrant To Act' (D4). The witness had never met (SD1) during the one-and-only meeting with Foo. Without (D4), Foo would not had applied successfully for the Post Mortem Report because the Post Mortem Report was issued out due to Foo's letter of Tetuan I Louis KH Wong. At page 19 and 20 Nota Keterangan, (SP3) confirmed and admitted he did indeed sign (D4).

...

I hardly find any piece of document that the Plaintiff had signed the same appointment letter to (SD1) at all material time. (SD1) further testified that (SP3)

could had appointed or engaged other lawyers to file a same claim such as a letter by Messrs G Dorai & Co. (D12). *To my mind, it is fair and just for (SD1) to deem the Plaintiff could had abandoned him as the solicitors and/or the claim altogether. In such a situation, (SD1) failure to attend the case management was fairly justifiable and acceptable, hence committed no violation of duty of care. As there was no solicitor-client relationship between (SD1) and the Plaintiff at all material time, (SD1) owes no duty of care to the Plaintiff.*

...

15. It is not a disputed fact that the Plaintiff took almost 8 years since the death of his daughter (in 2008) to supply LHDN and salary slips to the Defendant (in 2016) which delay is and become the cause of the failure of his intended dependency claim. In the case of : *Saad bin Marwi v Chan Hwan Hua* [2001] 2 AMR 2010 (CA), Gopal Sri Ram JCA (later FCJ) delivering the judgment of the court:

> ... Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable.
>
> Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

Based on the above principles, it is my considered view that the Plaintiff's delay in supplying those relevant documents, LHDN and salary slips, had not only caused the dependency claim to render it time barred (more than 3 years), his delaying would give any reasonable man like the Defendant, and irresistible inference that he has waived and/or abandoned his right, otherwise it causes so much prejudice on the Defendant. The time frame of 8 years is too long a time and no reasonable father whose daughter died 8 years ago would be so indolent to 'chase' his dependency claim. It is clearly an inordinate delay and guilty of laches or by his own delay conduct when the Plaintiff had slept on his right to claim and had not taken steps to exercise his right. In the case of: *Tan Poh Yee v Tan Boon Thien and other appeals* [2017] 3 MLJ 244; [2017] 3 CLJ 569 (CA), the court held that:

> ... With due respect to the learned judge, Her Ladyship had erred in fundamental respect of this case when she failed to give due consideration to the fact that since the passing of Madam Chang Ying in 2006 until November 2015, the respondent had slept upon his alleged rights and not taken any steps to exercise such alleged rights under the alleged contract or trust. However, the respondent only decided to take such action upon the fourth defendant having

been incapacitated in August 2015 through a stroke.

The respondent's acquiescence had caused the reliefs sought to be utterly destroyed due to the fact of unexplained idleness. He had not taken any action all these years but chosen to do so immediately after the fourth respondent became bedridden and was unable to make any decisions. The doctrine of laches has clearly manifested in the respondent's indolence in prosecuting his claim.

Premised on the aforesaid, the respondent's claim against the appellants was clearly frivolous and vexatious rendering it obviously unsustainable given that the respondent had failed to explain the delay since 2004 when the purported 2004 agreement was agreed upon and subsequently after Madam Chang Ying's demise in 2006.

...

16. In a professional suit, proving liability namely breach of duty alone is insufficient for the Plaintiff to succeed. The Plaintiff must also prove that his loss of opportunity namely the dependency claim or damage was materially caused by or directly linked to ot 'but for' the negligence act of the Defendant.

As I have quoted at length in my earlier finding under Third Issue above, I hardly find anything caused by the negligence act of the Defendant. the [*sic*] Plaintiff's loss of opportunity or damage was certainly caused by his own delay conduct and not materially caused by or directly linked to or 'but for' the negligence conduct of the Defendant. To my mind, the inordinate delay by the Plaintiff with such long silence for 8 years and the likelihood of him appointing other lawyers, Messrs. G. Dorai & Co., presumably in place of (SD1) to act for same claim would make any reasonable man like the Defendant would cause an inference to deem that the Plaintiff had abandoned or waived the claim including abandoned the Defendant as the solicitors. To this effect, it is my considered view that the Plaintiff's loss is wholly caused by his own dealt and not because of the Defendant's act.

...

(i) to call an expert by the Plaintiff would weaken its case and would render the Defendant Standard of Care be materially considered.

This include the fact that he did not attend case management after filing the writ summons because he did not receive relevant documents. There was no further instruction from Foo whatsoever. The Plaintiff engagement of other solicitors like Tetuan G Dorai & Co. which might had replaced him, thereby his reason for the absence, itself, was the standard of care he professed;

(ii) The Plaintiff relied on Foo to help him make dependency claim. In view of (SP3) signed the 'Warrant To Act' and appointed Tetuan Louis KH Wong as his solicitors; the solicitor-client relationship created between them. As such Tetuan Louis Wong owes duty of care to the Plaintiff;

(iii) Upon Foo's instruction by issuing (D13) to the Defendant to file the writ summons in order to stop the 3-year limitation period, *such solicitor- client relationship was created between Foo and the Defendant as far as filing of the writ summons is concerned. In this instant, the Defendant owes duty of care to Foo*;

(iv) *There is no solicitor-client relationship between the Plaintiff and the Defendant whatsoever*;

(v) *The loss of opportunity or damage was not materially caused by or directly liked to or 'but for' the negligence conduct of Defendant*; and

(vi) The Plaintiffs own inordinate delay for more than 8. years to contact and supply relevant documents to Foo and/or the Defendant reflect his own conduct to have slept on his right to claim and had not taken steps to exercise his right.

18. After hearing the submission by both parties, on the balance of probabilities, I hardly find any merit and justification in the Plaintiff's claims. It must therefore follow that the Plaintiff's claim misconceived and/or afterthought. In the premise, the Plaintiff's claim ought to be dismissed with cost RM40,000.00 by the Plaintiff to the Defendants. (Emphasis added.)

OUR DECISION

[59] This is quite a unique case where the defendant was not formally appointed by way of a warrant to act to act for the plaintiff in the dependency suit which was filed on 12 September 2011 and thereafter fixed for case management on 6 October 2011. It is fair to say that the defendant was not directly appointed by the plaintiff to file the dependency suit.

[60] Nevertheless, there is no dispute that the dependency suit was filed by the defendant on behalf of the plaintiff, who was making a dependency claim under s 7 of the CLA. The defendant's name appears on the filing receipt and in the writ itself. The cause papers and correspondence in fact refer to the defendant's file ref: (wc/0088/117/11–01). The defendant did not produce his office file during the trial.

[61] The dependency claim was in respect of the plaintiff's late daughter, the deceased who died on 15 September 2008 due to injuries in a motor accident which took place on 14 September 2008. The last date for the filing of the dependency claim (per s 7(5) of the CLA) is on 14 September 2011. The dependency suit which was filed by the defendant on 12 September 2011 was within time.

[62] As we had identified at the outset, the central issue is whether the plaintiff was the defendant's client for the purpose of the solicitor- client relationship.

[63] The defendant maintains that he owed no duty to the plaintiff because he acted on Foo's instructions. The JC concluded that there was a solicitor-client relationship between the defendant and Foo. The JC took the view that the defendant's 'client' was either 'foo' or 'LKHW'.

[64] In this regard, Foo issued a letter dated 4 August 2011 (exh D13) to the defendant to file a suit as the action was going to be time-barred very soon.

[65] The letter dated 4 August 2011 was sent by Foo claiming to be C/O of LKHW but the firm had already ceased to operate since 1 January 2008. According to Foo, he was an 'employee' at LKHW, but that statement (per his affidavit) is quite improbable and is in fact untrue as the letter was issued almost three years after LKHW had 'ceased' to operate.

[66] Nevertheless, the defendant proceeded to file the dependency suit. During the trial, the defendant claimed that he was not aware that LKHW had ceased to operate. The defendant also claimed that he was not able to contact the plaintiff. In this regard, we note that after filing the dependency suit there were no letters by the defendant to the plaintiff. There was also no letter to Foo to ask him to get a law firm to take over the dependency suit.

[67] But, the defendant did issue a letter dated 22 August 2011 to Foo (before filing the dependency suit) wherein he had expressed his difficulties in contacting the plaintiff and stipulating his conditions (relating to payment of fees) for handling the dependency claim.

[68] The defendant's letter dated 22 August 2011 reads as follows:

> Mr. Foo
>
> C/o MESSRS LOUIS K.H. WONG
>
> Suite 4.05, 4th Floor
>
> Floor Sun Complex
>
> Jalan Bukit Bintang
>
> 55100 Kuala Lumpur
>
> Dear Sirs,
>
> RE:- NEW SUIT
>
> IN THE HIGH COURT OF MALAYA AT SHAH ALAM
>
> GUAMAN NO : YET TO BE GIVEN
>
> PLAINTIFF : LEE KUANG GUAT
>
> DEFENDAN : MADAM CARMEL MURPHY AYOB & 1 OTHER
>
> 1. We refer to the above matter and to your oral instructions wherein you have requested that we file a suit on an urgent basis for and on behalf of Mr. Lee Kuang Guat who has approached Messrs Louis K.H. Wong.

2. Please be informed that we do not have Mr. Lee Kuang Guat's telephone number. We tried to go to see Mr. Lee Kuang Guat address at No. 30, Jalan Perdana 2/26, Pandan Perdana, 55300 Kuala Lumpur (As per the letter of Messrs G. Dorai & Co dated 29th September 2008 given to us by you) on 16/8/2011, but was informed that Mr. Lee Kuang Guat is not staying there. We need to contact him to get his further instructions on this matter. As such, we will be much obliged if you can get Mr. Lee Kuang Guat's telephone number and/or address and forward it to us.

3. Meanwhile, kindly informed Mr. Lee Kuang Guat on the following matter:-

3.1 Enclosed please find a copy of the Pernyataan Tuntutan (to be forwarded to Mr. Lee Kuang Guat) which we will be filing but not going to serve as we need the Pernyataan Tuntutan to be approved by Mr. Lee Kuang Guat before serving and also additional information thereafter we can amend the Pernyataan Tuntutan anytime before serving as instructed by you;

3.2 Our fees is RM10,000.00 as we are not conducting this file on a contingency basis, RM5,000.00 is to be paid once the Pernyataan Tuntutan is approved by Mr. Lee Kuang Guat with the necessary amendments if any and the balance of RM5,000.00 to be paid anytime before trial;

3.3 Please pay the sum of RM5,000.00 when returning with instructions from Mr. Lee Kuang Guat failure in which we shall consider Mr. Lee Kuang Guat do not want us to proceed with this claim and/or do not wish to engage us;

3.4 Kindly bank-in the sum of RM5,000.00 directly to our client account maintain at RHB 21427700038591 under the name of Chiang Chambers.

4. Kindly acknowledge receipt of this letter and the enclosure therein by signing and returning the duplicate of this letter.

Yours Faithfully,

CHIANG WOEI CHIEN (MR)

[69] Whatever may have been the express or tacit understanding or arrangement between Foo and the defendant with respect to the fee arrangement etc, and whatever difficulties he had in terms of contacting the plaintiff, the defendant did nevertheless take the overt step of filing the dependency suit. However, he did not attend court for case management on 6 October 2011.

[70] According to the defendant's counsel, the defendant did not even extract the sealed writ. The defendant also confirmed this in his witness

statement. It is of course interesting to note that during cross-examination, the defendant said that he was aware of the case management date.

[71] The defendant claimed that there was nothing to do as he could not contact the plaintiff. Foo had told him that he (Foo) also could not contact the plaintiff. He thought or assumed in the circumstances that the plaintiff had abandoned the dependency claim or may have asked another law firm to file a claim.

[72] But it is odd that the defendant did not apply to discharge himself as the solicitor on record for the plaintiff vis a vis the dependency suit. We accept that the defendant may have found himself to be in the invidious position of having filed a suit for a 'client' who was at all times, not contactable. This is significant because under O 64 r 4 of the Rules of Court 2012, the solicitor remains on record as the solicitor, until an order is granted that the solicitor has 'ceased' to be the solicitor for the party on whose behalf the suit was filed.

[73] We now proceed to deal with the primary question, whether the plaintiff was the defendant's client. This question could arise in a myriad of factual situations, including in a non-litigation context. For example, a similar question arose in the conveyancing context in the High Court case of *Ng Shiuh Huei v Asset First Sdn Bhd & Anor* [2014] 3 CLJ 1064; [2013] 1 LNS 715 (HC).

[74] In that case, Justice Yeoh Wee Siam (as she then was) said a retainer could be presumed or implied from the conduct of the parties or based on the preponderance of evidence.

[75] The learned judge also considered the elements which had to be proven in order to establish that the solicitor was negligent. On the issue of implied retainer, the learned judge said relevantly:

> [59] The court finds that *even though there is no written retainer, it can be presumed or implied from the preponderance of evidence as shown by the conduct of the plaintiff and the second defendant, that there is in actual fact a retainer of the second defendant by the plaintiff for the sale and purchase of the five properties*. It is clear that the second defendant allowed its name to be used as the solicitor on record for the SPAs.
>
> Whether The Second Defendant Breached The Contract By Failing To Carry Out Its Professional Duties
>
> [60] In view of the earlier finding of the court that there is no contract of appointment or written retainer between the plaintiff and the second defendant, there is no breach of contract or contractual obligations by the second defendant.
>
> [61] However, based on the presumed or implied retainer, there is a solicitor and client relationship between the second defendant and the plaintiff. *The plaintiff's*

claim is therefore dependent on his cause of action against the second defendant for the tort of negligence.

[76] As for the issue of negligence, the learned judge opined as follows:

Whether The Second Defendant Is Liable For The Tort Of Negligence

[62] In *Wong Kiong Hung & Anor v Chang Siew Lan & Another Appeal* [2009] 4 MLJ 183; [2009] 3 CLJ 751, Low Hop Bing JCA held:

[27] To succeed in the tort of negligence against the solicitor, it is incumbent on the client to establish that:

(1) the solicitor owes the client a duty of care;

(2) there is a breach of that duty by the solicitor;

(3) the client has thereby suffered damage; and

(4) the damage is not too remote a consequence of the breach.

Whether The Second Defendant Owes The Plaintiff A Duty Of Care

[63] Since the court has found that a solicitor and client relationship exists between the second defendant and the plaintiff, it is without doubt that the second defendant owes the plaintiff a duty of care in its discharge of its professional duties as a solicitor.

Whether There Is A Breach Of The Duty Of Care By The Second Defendant As Solicitor

[64] The standard of care required of the second defendant is that of an ordinary competent solicitor using reasonable care and skill in the use of his special skill as a solicitor (see Federal Court case, *Swamy v Mathews & Anor* [1968] 1 MLJ 138; [1967] 1 LNS 174, *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 and *Greaves v Baynhem Meikle* [1975] 3 All ER 99 per Lord Denning).

[77] On the issue of implied retainer, we think that it is also highly relevant to refer to the case of *Gurbachan Singh Bagawan Singh & Ors v Vellasamy Pennusamy & Other Appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719; [2015] 2 AMR 1 (FC) where the Federal Court opined that the facts and circumstances attendant upon the event or occasion could give rise to an implied solicitor-client relationship and once there is such a relationship, then all the relevant duties and obligations which are attendant upon that relationship will fall on the shoulders of the solicitor.

[78] The opinion of the Federal Court is to be found in the following paragraphs:

Solicitor-Client Relationship

[36] A solicitor-client relationship may arise either:

A

(a) by an express agreement between a solicitor and a client; or

(b) where there is express assertion by a solicitor to act for the client; or

(c) it may be implied.

B

[37] Where it is to be implied it is for the purported client in an action against a solicitor to prove the existence of a solicitor-client relationship between them. Proof of such relationship requires an objective consideration of all the facts and circumstances in order to come to a reasonable conclusion:

C

(a) that the purported client has sought for advice or assistance from the solicitor;

(b) that the assistance sought for was within the professional competence of the solicitor;

D

(c) that the solicitor expressly or impliedly agreed to provide such assistance or reasonably should know that the purported client would reasonably rely on him to provide the assistance; and

(d) that it was reasonable for the purported client to believe that the solicitor was representing him.

E

[38] It is therefore a matter of evidence to determine whether a solicitor-client relationship exists. Hence, it is essential to consider such evidence adduced including the words and conduct of the parties towards each other. It is also to be noted that *fee arrangement or payment is not determinative of the existence of a solicitor-client relationship*. Take for instance the case of the Minnesota woman who met a lawyer for less than an hour to consult on a possible claim for medical

F

negligence. At that point in time only ten months was left before limitation would set in. No fee arrangement or authorisation to act was discussed. But the woman was left with the impression that her case was weak and that the lawyer would consult with others to discuss the case, only getting back to her if she had a viable claim. The woman did not hear from the lawyer even after a year past. So she consulted another

G

lawyer but only to find that the statute of limitation had set in. The first lawyer was ultimately found liable and was ordered to pay a sum that the woman would have received if she had timely proceeded with her case. But unilateral belief by a purported client that the solicitor would represent him or her would not suffice.

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[39] In *Yong & Co v Wee Hood Teck Development* the then Federal Court agreed with the approach taken by the learned trial judge and held that 'there was ample evidence on record for the learned judge to conclude that a retainer came into existence by implication and as amplified by the conduct of the parties which showed a course of dealings giving rise to legal obligations and establishing the relationship of solicitor and client'. (See also: *Datuk Jagindar Singh & Ors v Tara Rajaratnam*).

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[40] Accordingly, where the evidence adduced including the words and conduct that transpired between a solicitor and a client determines that a solicitor-client relationship has come about, a retainer can then be said to exist, express or by implication. It is therefore not necessarily the existence of an express retainer that determines the existence of a solicitor-client relationship.

[41] It has been held that 'the giving of instructions by a client to a solicitor constitutes the solicitor's retainer by that client. It is not essential that the retainer must be in writing. It may be oral. It *may be implied by the conduct of the parties in the particular case*'.

[42] Indeed it should be noted that a 'retainer' in relation to solicitor-client relationship can be at least in three forms, namely, the payment of certain amount of money to the solicitor to be placed in trust accounts or a professional relationship that culminated between a solicitor and a client under given facts and circumstances or an agreement the existence of which depends on the facts and circumstances of each case.

[43] *Once a solicitor-client relationship exists and thus a retainer, it 'put into operation the normal terms of the contractual relationship including in particular the duty' of the solicitor 'to protect the interests' of his client 'in matters to which the retainer relates by all proper means'*.

[44] It was also held in *Underwood, Son & Piper v. Lewis*:

> ... that the law must imply that the contract of the solicitor upon a retainer in the action is an entire contract to conduct the action till the end. When a man goes to a solicitor and instructs him for the purpose of bringing or defending such an action, he does not mean to employ the solicitor to take one step, and then give him fresh instructions to take another step, and so on; *he instructs the solicitor as a skilled man to act for him in the action, to take all the necessary steps in it, and to carry it on till the end. If the meaning of the retainer is that the solicitor is to carry on the action to the end, it necessarily follows that the contract of the solicitor is an entire contract - that is, a contract to take all steps which are necessary to bring the action to a conclusion*.

[45] There is no reason why the foregoing principle cannot be applied with equal force to other services rendered by a solicitor. (Emphasis added.)

[79] In the present case, it was argued for the defendant that even if there existed a solicitor-client relationship, the plaintiff had to nevertheless establish the requisite standard of care and that there was a breach of that standard. In amplification, it was argued that the plaintiff ought to have adduced evidence by calling a solicitor who regularly handled running-down matters to explain the content or parameters of the requisite standard of care.

[80] In the present case, the plaintiff did not call any solicitor to testify as to the requisite standard of care in order to foist liability on the defendant. Counsel for the defendant relied on the Court of Appeal's decision in *Shearn Delamore & Co v Sadacharamani a/l Govindasamy* [2017] 1 MLJ 486; [2016] 6 AMR 797; [2016] AMEJ 2143; [2017] 2 CLJ 665 (CA).

[81] In that case, the appellant (law firm) had rendered two legal opinions to the respondent on specific areas of intellectual property ('IP') law. The respondent sued the appellant for professional negligence in respect of the IP

opinions and in failing to advise them of the implications that would ensue if the respondent were to exploit their invention. The High Court (*Maelstrom Resources Sdn Bhd and Anor v Shearn Delamore & Co (disaman sebagai firma)* [2006] MLJU 473; [2007] 1 CLJ 50) found that the appellants had given correct advice with respect to the patentability of the respondent's invention. However, the High Court opined that the appellant was negligent in failing to advise the respondent on the immediate financial impact and consequences of the advice to exploit the invention.

[82] The High Court found that if the respondent had been properly advised by the appellant with respect to the legal impediments that he would have to face over a period of time, he may have been able to weigh his options before deciding to exploit his invention.

[83] The appellant's appeal was allowed by the Court of Appeal which held that the respondent (the client) had to lead evidence to show what the standard of care was and that it had been breached. And since the respondent did not lead any evidence in relation to the standard of care, the element of departure from the requisite standard of care was not established. The appeal was accordingly allowed.

[84] In *Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* [2017] 4 MLJ 207; [2017] 6 CLJ 368; [2017] AMEJ 0298 (CA) the plaintiffs (the client) filed a suit alleging negligence on the part of the defendants (the conveyancing solicitor). The High Court found that the law firm was in breach of their duty of care towards the respondent on grounds, inter alia, that: (a) the second defendant had failed to incorporate the plaintiffs' comments into the final sale and purchase agreement between the vendor and the plaintiffs; and (b) the second defendant had failed to comply with the plaintiffs' instruction to terminate the sale and purchase agreement. The defendants appealed to the Court of Appeal. In exonerating the defendants, the Court of Appeal concluded that the plaintiff (the client) had not adduced evidence to show the appropriate standard of care, competence and diligence which the defendants should be held up to in conveyancing practice.

[85] The plaintiff had also failed to establish the causal connection between the alleged negligence and the damages which they had suffered. The opinion of the Court of Appeal was as follows:

> [29] The final finding which was also attacked was with regard to the failure by the defendants to advise the plaintiffs as to the progress of the transaction and also for unprofessional conduct. A glaring omission, which appeared to have been overlooked all round, was that no evidence was adduced to show the appropriate standard of care, competence and diligence which the defendants should be held up to in conveyancing practice. A solicitor, like all professionals, has a duty to exercise

reasonable degree of care and skill expected of a competent and reasonably experienced solicitor. In exercising reasonable care and skill, one must act with integrity and diligence (see *Sri Alam Sdn Bhd v Tetuan Radzuan Ibrahim & Co* [2010] 1 MLJ 284; [2010] 1 CLJ 913).

[30] Thus, whether the first defendant, and in particular the second defendant, who was the solicitor handling the transaction, were negligent may be determined by a consideration of the following questions:

(a) whether the standard of care practised by the second defendant was the same standard of reasonably competent solicitors in conveyancing practice; and

(b) whether the second defendant had acted with diligence in exercising the reasonable care and skill expected to assist the completion of the SPA.

[31] As alluded to earlier, it is unfortunate that no evidence was led as to the conveyancing practice in existence at the time. The learned judge appeared to rely on the evidence of the plaintiffs who were quite obviously not solicitors professing expertise in the field of conveyancing practice. The defendants, on the other hand, had the evidence of the third defendant who was a senior conveyancing practitioner. She testified that the procedure applied by the second defendant was in accordance with the accepted standards in conveyancing practice. Although she was an interested witness, her testimony was the best available evidence before the court. There was, at least, no material before the court to rule that the second defendant was guilty of unprofessional conduct. The finding of negligence in this context was therefore unfortunate.

[32] In this respect as well, we are compelled to note that there was no inquiry as to whether it was the first defendant's breach of duty which led to the losses sustained. The law requires a causal connection between breach of duty and injury suffered before liability is established in an action for negligence. In other words, was the defendant's act the effective cause of the harm suffered by the plaintiff?

In this respect, the courts look to the test of causation known commonly as the 'but for' test (see *Elizabeth Chin Yew Kim & Anor v Dato' Ong Gim Huat & Other Appeals* [2017] 1 MLJ 328; [2017] 2 CLJ 274; *Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors & Other Appeals* [2013] 2 MLJ 29; [2012] 7 CLJ 337 and *Ngan Siong Hing v RHB Bank Bhd* [2014] 2 MLJ 449; [2014] 3 CLJ 984).

[33] The 'but for' test simply means that 'but for' the defendant's negligent act, the harm would not have occurred. Applying the 'but for' test in the present case, the question is whether the plaintiffs' damage would have accrued but for the defendants' negligence.

In our view, the proximate cause of the plaintiffs' losses is the failure of the plaintiffs to obtain the financing and to settle the balance purchase price within the agreed period.

That had nothing to do with the defendants as solicitors. It was indeed a matter entirely within the control of the plaintiffs and the bank. In other words, there was no nexus between the exercise of care and skill by the defendants as solicitors to the granting or otherwise of the loan facility. As such, it must follow that the plaintiffs

have failed, in this respect, to establish liability on the part of the defendants.

[86] The above line of cases may be contrasted with the approach that was taken by this court in *Hijau Biru Envirotech Sdn Bhd v Tetuan Dzahara & Associates & 2 Ors* [2020] 5 MLJ 549; [2020] AMEJ 0885; [2020] MLJU 1201; [2021] 1 CLJ 186 (CA). The appeal arose out of a claim by the appellant against the respondents (their former solicitors) for their negligence in respect of the appellant's claim in court which was struck out (with costs) due to the absence of the appellant's solicitor (third respondent) when the suit was called up for continued hearing.

[87] In that case, the appellant did not tender any evidence as to the standard of care that was expected of a solicitor. The Court of Appeal opined that such evidence was not necessary in the circumstances. The Court of Appeal held that:

> [78] Turning next to the standard of care, no doubt, in the Sessions Court the appellant did not call any advocate and solicitor to testify as to what a reasonably competent advocate and solicitor would have done in a similar situation.
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> [79] In this regard, we note that in *Shearn Delamore & Co v Sadacharamani Govindasamy* [2017] 1 MLJ 486; [2017] 2 CLJ 665; [2016] 6 AMR 797 CA, the Court of Appeal had posited that a client who sues their former solicitors for professional negligence have the burden proving that the solicitor's conduct had fallen short of the standard of care of a reasonably competent solicitor and that this is to be done by calling an advocate and solicitor to satisfy the element of breach of the standard of care. See also *Ngan Siong Hing v RHB Bank Berhad* [2014] 2 MLJ 449; [2014] 3 CLJ 984; [2014] 1 AMCR 829; [2014] AMEJ 0062 (CA).
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> [80] In *Shearn Delamore*'s case, the former client had contended that the solicitors were negligent in respect of legal opinions which they had given on the subject of intellectual property rights. The former client did not call any advocate and solicitor who specialized in intellectual property law to testify in court. The appeal was allowed and the claim was dismissed.
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> [81] However, in *Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor* [2020] 4 MLJ 380; [2020] 5 CLJ 82; [2020] 3 AMR 317 CA, Suraya Bte Othman JCA speaking for the Court of Appeal distinguished *Shearn Delamore's* case and stated that the failure to call an expert to testify as to the standard of care that is expected of an advocate and solicitor is not fatal in every case of professional negligence against an advocate and solicitor.
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> [82] *The issue in that case was a simple case, which pertained to the duty of a practitioner to inform and advise the client of the consequence of non-payment of security for costs (which was ordered by the Court) which would result in the case being struck out*. (see: paragraph [64] of the judgment).
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> [83] Thus, applying the principles that may be culled from the cases mentioned above, and looking at all the circumstances, *we are satisfied that in the present case, the failure on the part of the appellant to call an advocate and solicitor to testify on how a*

reasonably incompetent advocate and solicitor would have handled the situation, is not fatal on the issue of breach of standard of care of a reasonably competent advocate and solicitor.

[84] In our view, apart from the initial negligence of not attending court on 11th January, 2016, the respondents had compounded or aggravated their initial negligence by taking the route of not filing an appeal against the dismissal of the reinstatement application and proceeding instead to file Suit 18. Of course, there is no certainty that an appeal to the High Court or the Court of Appeal would have resulted in a reinstatement of Suit 04. We should add that the situation was not helped by the lack of forthrightness on the part of the respondents as to the precise reason for their non-attendance on 11th January 2016 and the 3rd respondent's woefully inadequate and unclear affidavit in support of the application to reinstate Suit 04. Yet further, the 3rd respondent did not reply to the affidavit by Sinnayah's solicitor which stated that the request was only for 7th January, 2016 to be vacated. This last omission in our estimation, spoke volumes against the respondents.

[85] Ultimately, by their various actions and inaction or inadequacies, the respondents had decimated the appellant's chance of recovery against Sinnayah. In the event, there was a clear and unmistakeable finding of professional negligence by the SCJ in Suit 313 and those findings are in our view, clear, cogent and convincing. (Emphasis added.)

[88] In our view, even though the plaintiff had signed a warrant to act in favour of LKHW and despite there being a letter from Messrs G Dorai & Co (29 September 2008) to the owner of the opposite motorcar WKJ 21, the fact of the matter is that the defendant assumed responsibility as an advocate and solicitor when he filed the dependency suit for and on behalf of the plaintiff.

[89] No doubt, it was Foo who gave the 'instructions' for the defendant to file the dependency suit, but that only makes Foo an intermediary. In our view, the fact that the plaintiff did not directly appoint the defendant is neither here nor there. The fact that the defendant agreed to and did file the dependency suit amounts to an 'implied retainer' and gives rise to a solicitor-client relationship between the defendant (solicitor) and the plaintiff (client).

[90] Hence, following the case of *Gurbachan Singh*, it is our view that the absence of a warrant to act does not preclude an implied retainer. And, once there is a retainer, the defendant is under a duty to protect the plaintiff's interest. This is regardless of whether the plaintiff had paid any fee to the defendant or whether the plaintiff is contactable or whether the solicitor had even met the plaintiff.

[91] Hence, the fact that fees were not paid is a separate matter altogether. The defendant's letter dated 4 January 2017 in reply to the plaintiff's current solicitor (Messrs Manian K Marappan & Co) making reference to 'our mutual client' is further indication of the existence of solicitor-client relationship. The

A defendant cannot therefore disavow or deny that the plaintiff was his client at all material times.

B **[92]** Next, as for the standard of care, we are of the view that this was a simple case of a litigation solicitor's failure to protect the interest of his client by failing to attend at case management which resulted in the dependency suit being struck out on 6 October 2011. And by that date, the action had become time-barred.

C **[93]** In this regard, we do not think the defendant has discharged his duty towards his client the plaintiff in term of protecting the plaintiff's interest and the minimum that is expected of the defendant (for which no expert evidence is required) is to extract the Writ and turn up at the case management on 6 October 2011. The defendant had a window of 24 days to arrange for the D dependency suit to be taken over by another firm of solicitor.

[94] Since the defendant was already aware that the dependency suit was filed shortly before the period of limitation had expired, he ought to have been alive and conscious to the fact that there was no possibility of filing a fresh suit E after 14 September 2011. As such, the dependency suit was a precious action which had to be preserved.

F **[95]** In this regard, all that the defendant had to do was to turn up at the case management and obtain a long case management date so that matters could be attended to in the meanwhile. The conduct of the defendant is totally at odds with para 9 of his defence dated 23 October 2017.

G **[96]** In para 9 of the defence he stated, 'Defendan mengatakan pada setiap masa material, defendan melakukan tindakan secara/sebagai professional berkompeten dan berhati hati dan tidak langusng [sic] memungkiri apa apa kecuaian'.

H **[97]** There is no paper trail to show that the defendant did what was necessary to keep the dependency suit alive. He just let it die a natural death on 6 October 2011. With that, the plaintiff lost his chance of prosecuting a valid dependency claim. And since it had become time-barred, a new suit could not be filed for all practical purposes as it would obviously be struck out upon application by the defendant(s).

I **[98]** In so far as the standard of care is concerned, we do not agree that in the present case, the plaintiff's failure to call a solicitor experienced in handling running-down cases to explain the standard of care is fatal, or that the standard of care was not established.

[99] Looking at the facts and circumstances in the round, it is plainly obvious even to a novice solicitor, that the dependency suit had to be 'preserved' at all costs especially since it was filed just a few days before the claim became time-barred.

[100] Thus, the dependency suit was precious and every effort ought to have been made to protect the plaintiff's interests. As such, the defendant ought to have known that if the dependency suit were struck out, then the plaintiff would have no recourse to claim against the original tortfeasors.

[101] It was therefore imperative for the defendant, as the solicitor who filed the dependency suit to have ensured that counsel attended before the registrar on 6 October 2011 and take the reasonable and prudent course of seeking a long date for case management so as to give enough time to contact Foo/the plaintiff and to get up to speed on the information and details pertaining to the accident and the particulars of loss etc and to make the necessary amendments to the statement of claim. After all, the defendant knew that he was (as he put it) to 'file first and amend later'. As we mentioned, there were some mistakes in the statement of claim, but those could be amended.

[102] Of course, the defendant's failure to give the notice under s 96(2) of the Road Transport Act 1987 is a serious omission but that of itself does not impact upon the dependency suit and its practical effect will only be realised when the plaintiff seeks to enforce the judgment in the dependency suit against the tortfeasors.

[103] The other impediment is of course the failure to add Azlan as a defendant in the dependency suit. Whether Azlan could have been added later (after 14 September 2011) is uncertain. This is because if Azan did not object, then his initial non-joinder would amount to nothing. If he objected (which is very likely) then it is almost certain that the objection will be upheld. At any rate, all of this is speculative as the dependency suit did not progress beyond 6 October 2011. Whatever may have been the outcome, it is important to keep in mind that the deceased was an innocent passenger in motorcar No WLY 3665.

[104] Hence, as the deceased was an innocent passenger, the plaintiff would be entitled to claim damages for loss of dependency on the basis of 100% liability against the driver of motorcar No WQJ 21 without claiming any damages from the driver of motorcar No WLY 3665 (see: *Muhamad Jafri bin Jantan & Ors v Zainal bin Md Rais* [2005] 2 MLJ 318; [2005] 1 CLJ 694; [2005] 1 LNS 8 CA at paras [9]–[11]). Thus, the plaintiff would be entitled to damages on the basis of 100% liability against the driver of motorcar No WQJ

21 regardless of any apportionment of liability between the drivers of the two motorcars (WLY 3665 and WQJ 21).

[105] In this regard, it is apposite to mention that in Suit 20, the plaintiff attempted to prove his loss of chance (see *Pang Yeow Chow v Advance Specialist Treatment Engineering Sdn Bhd* [2015] 1 MLJ 490; [2014] 8 CLJ 188; [2014] 1 LNS 1016 (CA)). The plaintiff tried to prove all that he would have proven in the dependency suit (ie liability and defendant damages), but was prevented from doing so because the defendant objected and this was upheld by the JC.

[106] As such, the plaintiff cannot be blamed for not adducing evidence pertaining to his loss of chance. Since, it was the defendant who prevented the plaintiff from adducing relevant evidence at the trial of Suit 20, it is appropriate, fair and just that we should draw an adverse inference against the defendant and to presume, that if the dependency suit had progressed and concluded in the ordinary way, the plaintiff's dependency suit would have been allowed.

[107] In the result, we are impelled to the view that the plaintiff was at all material times, the defendant's client as there was an implied retainer. There was therefore a solicitor-client relationship between the plaintiff and defendant. Finally, we are satisfied that the defendant had fallen way short of the standard of care that was expected of a solicitor who was similarly circumstanced.

[108] The defendant's failure to attend court on 6 October 2011 is a manifestation of an abject and egregious abdication of responsibility and duty towards the client. The defendant is therefore liable for professional negligence for what he did and did not do, along the lines as discussed above.

[109] The JC's conclusion that the plaintiff was not the defendant's client is untenable in the circumstances. The JC was plainly wrong in reaching that conclusion. The JC was wrong to attribute blame to the plaintiff for belatedly giving instructions or documents to the defendant as the delay in providing the documents or instructions were not causally connected to the striking out of the dependency suit on 6 October 2011. There is no doubt in our mind that the reason the dependency suit was struck out was because counsel did not attend court on that day.

[110] The defendant's explanation that he did not attend to the case management because he thought that the plaintiff had engaged another law firm to act in the matter or that the plaintiff had 'abandoned' the claim is preposterous to say the least.

[111] There is no evidence to suggest that the plaintiff had abandoned the claim for dependency. The defendant was under a duty to protect his client's interests. He failed in that regard. The defendant made the fatal mistake of assuming that the plaintiff was not his client. The defendant failed to appreciate that even if there was no formal retainer, the plaintiff could nevertheless be a client under an implied retainer. As such, we are of the view that the JC was plainly wrong, and appellate intervention is therefore warranted in the circumstances.

[112] As for damages, the evidence shows that the plaintiff had produced the income tax of the deceased for the year 2006 and 2007 (exh P1). The income of the deceased per month was proximately RM1,800 per month. The plaintiff had claimed loss of dependency of RM600 per month. The deceased was 27 years old when she died (and was single). The plaintiff would be entitled to 16 years of purchase under s 73(iv)(d) of the CLA which states that, 'a person who was of the age of thirty years and below at the time of his death, the number of years' purchase shall be 16'. We think that RM600 is fair, reasonable and probable in the circumstances. Hence, loss of dependency at RM600 per month for 16 years purchase would give a sum of RM115,200. Therefore, the claim of dependency is RM115,200. The plaintiff also claimed funeral expenses at RM3,000. This is a very fair figure.

[113] In the circumstances, we are satisfied that the plaintiff has proven on a balance of probabilities that, but for the defendant's negligence, the dependency suit would have been allowed and that the plaintiff would have obtained damages for loss of dependency for the amount that was sought as mentioned above together with funeral expenses.

OUTCOME

[114] For the reasons as discussed above, the plaintiff's appeal is allowed. The High Court order dated 11 October 2019 is set aside. We allow damages for loss of dependency on the basis of RM600 per month. Hence, the award for loss of dependency is RM115,200 (RM600 x 12 x 16). In addition, we also allowed funeral expenses of RM3,000 (per s 7(3)(ii) of the CLA) with interest at 5%pa from date of filing of the dependency suit ie, 12 September 2011 until the date of full payment or realization. We also awarded cost in the sum of RM40,000 as costs here and below (subject to allocator).

Appeal allowed.

Reported by Ahmad Ismail Illman Mohd Razali